

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,016

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 22 1963

Nathan J. Paulson
CLERK

LAURA ELLA GRIFFIN,

v.

JOHN S. GLEASON, JR., Et Al

898
Appellant,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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JOINT APPENDIX

[Filed November 20, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIALAURA ELLA GRIFFIN
21 Fifth Street
Newark, New Jersey

Plaintiff,

vs.

Civil Action No.
3643-'62JOHN S. GLEASON, JR.
Individually and as Administrator
Veterans AdministrationJOHN W. MACY, JR.
Individually and as Chairman
United States Civil Service CommissionFREDERIC J. LAWTON
Individually and as Commissioner
United States Civil Service CommissionROBERT E. HAMPTON
Individually and as Commissioner
United States Civil Service Commission

Defendants.

COMPLAINT FOR DECLARATORY INJUNCTION AND
MANDATORY INJUNCTION ORDERING THE
ADMINISTRATOR, VETERANS ADMINISTRATION,
TO REINSTATE PLAINTIFF IN HER POSITION
AS FOOD SERVICE WORKER, WA-7408-2/3,
\$1.80 p.h. DAY, \$1.98 p.h. NIGHT IN THE
VETERANS ADMINISTRATION AND FOR BACK PAY

1. This is an action in equity wherein the matter in controversy exceeds the value of Ten Thousand Dollars (\$10,000.00) exclusive, of interest and costs, and arises in the District of Columbia under the laws of the United States.

2. The plaintiff, Laura Ella Griffin, is a citizen of the United States and a resident of the State of New Jersey; she was appointed a

Food Service Worker, WA-7408-2/1, \$1.26 p.h. day, \$1.39 p.h. Night, in the Veterans Administration Hospital, East Orange, New Jersey, on October 7, 1957. Since the date of her appointment and qualification she has served continuously until July 31, 1961, when she was illegally and arbitrarily and capriciously separated from her employment while holding the position of Food Service Worker, WA-7408-2/3, \$1.80 p.h. Day, \$1.98 p.h. Night, Veterans Administration Hospital, East Orange, New Jersey.

3. Defendant, John S. Gleason, Jr., is Administrator, Veterans Administration of the United States of America, and plaintiff's highest supervisory officer; Defendant, John W. Macy, Jr., is chairman; and defendants, Frederic J. Lawton and Robert E. Hampton, are Commissioners of the United States Civil Service Commissioners of the United States Civil Service Commission, all of whom officially reside in the District of Columbia.

4. That on or about June 20, 1961, she was requested to undergo a physical examination by the Chief Dietician of the Veterans Hospital, Orange, New Jersey.

5. Plaintiff took a physical examination at the said Veterans Administration Hospital, and also a physical examination by her private physician.

6. That on July 31, 1961, she was removed from her said position without notice and without cause, and arbitrarily and capriciously, and illegally.

7. On August 2, 1961, her attorney, Harvey G. Stevenson, of East Orange, New Jersey, wrote Veterans Administration, East Orange, New Jersey, requesting reasons for plaintiff's removal.

8. On August 3, 1961, George M. Rynick, Personnel Officer, Veterans Administration Hospital, East Orange, New Jersey, wrote the said Harvey G. Stevenson, and enclosed a letter of Proposed Removal, dated June 26, 1961, and a letter of Removal, dated July 6, 1961.

9. That plaintiff discovered the contents of the above letters of Proposed Removal and Removal for the first time after August 3, 1961 in the office of her attorney, Harvey G. Stevenson.

10. On August 5, 1961, the termination of her employment was administratively effective.

11. On September 4, 1961, her appeal to the Second United States Civil Service Region, was denied by John A. Galvin, Appeals Examiner.

12. On September 8, 1961, plaintiff appealed to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D.C.

13. On September 21, 1961, her appeal was denied by the Board of Appeals and Review, United States Civil Service Commission.

14. On October 18, 1961, plaintiff filed Civil Action No. 870-61 in the United States District Court for the District of New Jersey, seeking a judicial review of her removal. On April 26, 1962, this action was dismissed under "Rule 41(b) of the Federal Rules of Civil Procedure but without prejudice."

15. Plaintiff denies each and every allegation in the letter of Proposed Removal, dated June 26, 1961.

16. Plaintiff alleges that the actions of the Veterans Administration and of the Civil Service Commission in holding that her removal from her position as a Food Service Worker was arbitrary, capricious and illegal, and not in accordance with law in excess of statutory jurisdiction, without observance of procedure required by law.

17. The plaintiff seeks a declaratory and mandatory injunction under the provision of 28 USC, Sections 2201-2202: (The Declaratory Judgment Act), 5 USC, Sections 1001-1009 (The Administrative Procedure Act): 5 USC, Section 652(a) (The Lloyd-La Follette Act of 1912 as amended) and other federal laws and regulations.

18. The plaintiff alleges that the action of the Civil Service Commission in holding that the removal was in compliance with regulation, is arbitrary, capricious, illegal, and is such action that will not promote the efficiency of the service, and is not in accordance with law; and is in excess of statutory jurisdiction; and without observance of procedure required by law.

19. The plaintiff alleges that the actions of the Veterans Administration in preferring charges against her is arbitrary, capricious and illegal; and is such action that will not promote the efficiency of the service, and is not in accordance with law; and is in excess of statutory jurisdiction; and without observance of procedure required by law.

WHEREFORE, the plaintiff prays that this Honorable Court will:

1. Take jurisdiction of this cause.
2. Issue a Declaratory Judgment, declaring that plaintiff's removal from office is void, unlawful and of no effect and that plaintiff was never legally separated from her position in the Veterans Administration.
3. Issue a Mandatory Injunction, ordering and directing the said defendant as official of the Veterans Administration, to restore plaintiff to her proper position in the Veterans Administration, as of the date of her illegal and unlawful removal, together with all rights, benefits and privileges that would or might accrue from a continuity of service from the date of such illegal or unlawful discharge to the date of judgment.
4. And for such other or further relief that may to the Court seem meet and proper.

/s/ Laura Ella Griffin

[CERTIFICATION]

[Jurat dated November 20, 1962]

[Filed March 20, 1963]

**MOTION TO DISMISS OR IN
THE ALTERNATIVE FOR SUMMARY JUDGMENT**

Comes now the United States Attorney on behalf of the defendants and moves this Court to dismiss the complaint for failure to state a cause of action upon which relief can be granted or in the alternative for summary judgment on the ground that there is no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law.

Attached hereto and made part of this motion is a certified copy of the proceedings before the United States Civil Service Commission.

/s/ David C. Acheson
United States Attorney

/s/ Charles T. Duncan, Principal
Assistant United States Attorney

/s/ Joseph M. Hannon
Assistant United States Attorney

/s/ Alan Kay
Assistant United States Attorney

[Certificate of Service]

[Filed March 20, 1963]

**STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE PURSUANT TO RULE 9(h)**

In this case the defendant moves to dismiss or in the alternative moves for summary judgment, contending that there is no genuine issue of material facts present. Pursuant to Rule 9(h) of the rules of this Court, the material facts as to which there is no genuine issue are as follows:

1. The plaintiff was employed in a Veterans' Administration Hospital at East Orange, New Jersey as a Food Service worker until her removal on July 31, 1961.
2. On June 26, 1961, the plaintiff was given, by letter, an Advance Notice of Proposed Removal for insubordination. The charge of insubordination was based upon her refusal to submit to a full medical examination. Said examination was to include a mental as well as a physical examination.
3. Plaintiff received this notice on June 26, 1961, and immediately destroyed it. On June 28, 1961, she was advised orally of the contents of the written notice dated June 26, 1961.
4. The Advance Notice advised plaintiff that she would be afforded a hearing provided she so request. The record contains no request for a hearing, nor is there any indication of any reply by the

plaintiff, either personally or in writing, to the Advance Notice.

5. On July 6, 1961, the plaintiff was given her Notice of Final Removal, effective July 31, 1961 based upon a finding that the charges as stated in the Advance Notice had been sustained for the following reasons:

Deliberate refusal to carry out repeated supervisory instructions to report for completion of an examination by our physicians.

6. In reaching this decision, careful consideration was given to all the facts and prior disciplinary actions.

7. On the same day, July 6, 1961, plaintiff was notified orally of this Notice of Final Removal. Plaintiff refused to accept the written notice. On July 8, 1961, said notice was mailed to her last known address by certified mail but delivery was never accepted by the addressee.

8. Sometime prior to August 16, 1961, plaintiff appealed her removal to the Second United States Civil Service Region. On September 4, 1961, the Region issued its decision, concluding that the applicable regulations had been followed and the appeal was, therefore, denied.

9. On September 8, 1961, plaintiff appealed the decision of the Second Region to the Board of Appeals and Review on the ground that she had been denied an opportunity to confront and cross-examine the witnesses against her.

10. On September 21, 1961, the Board of Appeals and Review issued its decision, finding that the Veterans' Administration Hospital had complied with the procedural requirements of the Civil Service Commission's regulations and the decision of the Second Civil Service Region was affirmed.

11. On November 20, 1962, plaintiff filed the instant action in this Court.

/s/ DAVID C. ACHESON
United States Attorney

/s/ CHARLES T. DUNCAN, Principal
Assistant United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ ALAN KAY
Assistant United States Attorney

[Filed April 18, 1963]

**PLAINTIFF'S OPPOSITION TO THE MOTION TO DISMISS
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT
AND
PLAINTIFF'S MOTION TO DISMISS OR IN THE
ALTERNATIVE FOR SUMMARY JUDGMENT**

Comes now the plaintiff, by counsel and opposes the defendant's motion to dismiss or in the alternative for summary judgment and further plaintiff moves the Court to dismiss or in the alternative for summary judgment on the ground that there is no genuine issue of material fact and that plaintiff is entitled to judgment as a matter of law.

/s/ Donald H. Dalton
Federal Bar Building
1815 H Street, N.W.
Washington, D.C.
393 0555
Attorney for Plaintiff

[CERTIFICATE OF SERVICE]

[Filed April 19, 1963]

AFFIDAVIT

CITY OF WASHINGTON, ss:
DISTRICT OF COLUMBIA,

I, Laura E. Griffin, being first duly sworn on oath, depose and say that I am the plaintiff herein, and that I was employed as a Food Service Worker, WA-7408-2/3, \$1.80 per hour day, \$1.98 per hour night, at the Veterans Administration Hospital, East Orange, New Jersey in 1961; that on or about June 20, 1961, I was requested to obtain a medical examination by the Chief Dietician of the Veterans

Administration Hospital, East Orange, New Jersey; that I was physically examined by a physician of the said hospital; that I was removed from my said position on July 31, 1961 without notice, or cause for said removal; that I retained an attorney, Harvey G. Stevenson, Esquire, of East Orange, New Jersey, who wrote Veterans Administration Hospital (attention of Personnel Director), East Orange, New Jersey, on August 2, 1961; that George M. Rynick, Personnel Officer, Veterans Administration Hospital, East Orange, New Jersey, on August 3, 1961, wrote the said Harvey G. Stevenson and enclosed a letter of Proposed Removal, dated June 26, 1961 and a letter of Removal, dated July 6, 1961; that these letters were first seen by me after they were received by Mr. Stevenson; that I have not had a hearing on the matter; that I have not confronted witnesses against me; that I deny each and every allegation in the said Letter of Removal.

/s/ Laura E. Griffin

Subscribed and sworn to before me on this 3rd day of January, 1963.

/s/ BRIDGET VIETRI
Notary Public of New Jersey
My Commission Expires
Mar. 25, 1964

/s/ Donald H. Dalton
Federal Bar Building
1815 H Street, N.W.
Washington, D. C.
393-0555
Attorney for Plaintiff

[Filed April 19, 1963]

AFFIDAVIT

STATE OF NEW JERSEY, ss:

I, Harry Carter, being first duly sworn, depose and say that I am a minister of the Baptist Church and that I live at 45 Washington Terrace, East Orange, New Jersey; that I have known Laura E. Griffin for six years; that she is an honest and industrious woman of excellent personal character. She is friendly and cooperative and trustworthy.

/s/ Harry Carter

Subscribed and sworn to before me, a notary public, this
30th day of January, 1963.

/s/ FRANCES W. FISK
Notary Public of N.J.
My Commission Expires
Sept. 26, 1967

/s/ Donald H. Dalton
Federal Bar Building
1815 H Street, N.W.
Washington, D. C.
393-0555
Attorney for Plaintiff

[Filed April 26, 1963]

INTERROGATORIES

TO: LAURA ELLA GRIFFIN
c/o Donald H. Dalton, Esquire
1815 - H Street, N.W.
Washington, D. C.

The following interrogatories are addressed to you by the defendants, pursuant to Rule 33, Federal Rules of Civil Procedure. You are required to answer these interrogatories separately and fully in writing, under oath, to serve a copy of your answers on the United States Attorney for the District of Columbia, attorney for the said defendants, within fifteen (15) days after the interrogatories are served upon you.

1. Please identify yourself by giving your full name, age, residence and present occupation.
2. Please give all addresses at which you have resided since May, 1961 with the dates resided at each address.
3. Please state your social security number.
4. Please state your occupation, the place of your employment and the name of your immediate supervisor in June 1961.
5. Were you requested to undergo a complete medical examination prior to your discharge from the Veterans Administration Hospital on July 31, 1961?

6. If the answer to interrogatory No. 5 is 'yes', did you refuse to undergo the neuropsychiatric portion of that medical examination?

7. In June and July 1961, were you acquainted with Mrs. Reizel H. Horrel, Chief, Dietetic Service?

8. In June and July 1961, were you acquainted with Mr. Fabian G. Parish, Assistant Head Supervisor?

9. If the answer to interrogatory No. 8 is 'yes', did Mr. Fabian G. Parish give you a letter on June 6, 1961, advising you of the proposed removal action to be taken against you?

10. Did you immediately upon receipt of the letter mentioned in interrogatory No. 9, destroy it?

11. Were you advised on June 28, 1961, at approximately 3:00 p.m. by one B. U. Ritzert, Personnel Management Specialist, in the presence of Mrs. Catherine Leach, of the Hospital's intention to commence removal proceedings against you?

12. On July 6, 1961, in the presence of Mr. M. Salmon, did one B. U. Ritzert advise you of the final decision to remove you effective July 31, 1961.

13. On July 6, 1961, in the presence of Mr. M. Salmon, did Mr. Ritzert tender you a letter informing you of the Hospital's final decision to remove, you, which letter you refused to accept?

/s/ ALAN KAY
Assistant United States Attorney

[CERTIFICATE OF SERVICE]

[Filed May 11, 1963]

ANSWERS TO INTERROGATORIES

Answers to the plaintiff to the interrogatories propounded to her by the defendants are as follows:

1. Laura Ella Griffin

Age: 42

Residence: 21 - 5th Street, Newark, New Jersey

Present Occupation: housekeeper

2. 21 - 5th Street, Newark, New Jersey

3. 021-20-1325

4. dietetics food service worker

Veterans Administration Hospital

East Orange, New Jersey

Catherine Lynch

5. Yes.

6. No.

7. Yes.

8. Yes.

9. No.

Mr. Parish did show me a piece of paper which he did not hand to me. He said "This is what you get for telling Mr. Stevens (Harry J. Stevens, Inc., East Orange, New Jersey) the real estate man for telling the people upstairs in your house to move." He did not tell me what was in the paper. I thought that it was a letter which someone had given to him or written to him.

I did not know that the paper had anything to do with the hospital.

I wondered at the time how he knew that I was trying to remove my tenants from the second floor.

I am colored, my tenants were colored and Mr. Parish was colored. I assumed that somehow my tenants had "got to" Mr. Parish to try to influence me.

10. I never had the paper (mentioned above) in my hands and I never destroyed any paper which Mr. Parish handed to me.

11. No.

12. No.

13. No.

/s/ Laura Ella Griffin

STATE OF NEW JERSEY :
COUNTY OF ESSEX : SS

Laura Ella Griffin, being first fully sworn on oath, deposes and says that she is the plaintiff herein; that she has read the foregoing Answers to Interrogatories by her subscribed and that she knows the contents thereof; that the matters and things therein are true to her personal knowledge and belief and those stated upon information and belief, she believes to be true.

/s/ Laura Ella Griffin

Subscribed and sworn to before me
a Notary Public of the State of New
Jersey this 7th day of May, 1963

/s/ BRIDGET VIETRI
Notary Public of New Jersey
My Commission Expires
Mar. 25, 1964

/s/ Donald H. Dalton
Federal Bar Building
1815 - H Street, N.W.
Washington, D. C.
Attorney for Plaintiff

[CERTIFICATE OF SERVICE]

AFFIDAVIT

[Filed May 24, 1963]

STATE OF NEW JERSEY:
COUNTY OF ESSEX : SS

Fabian G. Parish, residing at 272 Orange Road, Montclair, New Jersey, being duly sworn according to law on his oath deposes and says:

I have been employed with the Veterans Administration from October 3, 1946, to the present date except for a period of time from August 25, 1951, to August 19, 1952. I have been employed in the Dietetic Service at the VA Hospital, East Orange, New Jersey since August 1952. I am the Assistant Head Food Service Supervisor at the hospital which position I have held since about January 1960.

On June 26, 1961, Mrs. Horel, Chief of the Dietetic Service at the VA Hospital, East Orange, New Jersey, requested me to bring Miss Laura Griffin, an employee in the Dietetic Service Department, to her office. I asked Miss Griffin to go to the office of Mrs. Horel and she stated that she would meet me there shortly.

When Miss Griffin failed to appear at Mrs. Horel's office, I was told that a letter dated June 26, 1961, to Miss Griffin had been prepared containing a statement of charges against her for which charges it was proposed to effect her removal from employment. I was requested by Mrs. Horel to take the letter to Miss Griffin and read its contents to her.

On the same day, June 26, 1961, I took the letter to Miss Griffin who was working in the kitchen of the hospital at that time and I asked her to go to my office and she refused to do so. I then informed Miss Griffin that I had a letter for her from Mrs. Horel and I attempted to read the contents of the letter to her. As soon as I started to read the letter she became emotionally disturbed and would not permit me to continue with the reading of it. She asked for the letter and immediately ripped it up without reading it. She demanded to be left alone and stated further that she did not want any of this type of letter in her mail.

/s/ Fabian G. Parish

SWORN AND SUBSCRIBED TO
BEFORE ME THIS 21st DAY
OF MAY, 1963.

/s/ Gertrude Gerndt
Notary Public of New Jersey

[Filed May 24, 1963]

AFFIDAVIT

CITY OF WASHINGTON :
DISTRICT OF COLUMBIA : ss

Bernard U. Ritzert, being first duly sworn, deposes under oath and says:

1. That the affiant has personal knowledge of the matters stated herein and believes the matters contained herein to be true and correct. That I am the personnel officer at the Veterans' Administration Hospital, Baltimore, Maryland. That from November 1959 until April 1962 I was the Personnel Management Specialist at the Veterans' Administration Hospital, East Orange, New Jersey. That until her separation on July 31, 1961, plaintiff, Laura Ella Griffin, was a food service worker employed at the Veterans' Administration Hospital, East Orange, New Jersey.

2. That on June 28, 1961 accompanied by one Catherine Leech, supervisory food service worker, I informed Laura Ella Griffin at her worksite, that the letter of proposed removal dated June 26, 1961 contained a notification to her that the hospital proposed to commence removal procedures against her for failure to comply with a supervisory request to report for completion of a medical examination. I informed her that the contents of the letter of proposed removal dated June 26, 1961, contained the reasons for her proposed removal, namely her repeated refusal to comply with the hospital's request that she undergo a complete medical and mental examination. At this point in the conversation the plaintiff became agitated and stated that nobody was going to remove her and that she doesn't want to receive any letters, that the difficulties were caused by everybody else, not her and that she "wants to be left alone to do her work". She further stated to me that she did not want to see any doctor and that she would go to Washington on this matter. Plaintiff then walked away from me and returned to her work area.

3. On July 6, 1961 at my office and in the presence of one Milton Salmon, I again spoke to Laura Ella Griffin. I explained to her that she was asked to report to my office for the purpose of informing her that a decision had been made regarding her proposed removal. I briefly restated my previous conversation with her on June 28, 1961. I then advised her that a decision had been made by the hospital to remove her and that her last day of duty would be July 31, 1961.

I proffered the letter of Final Notice of Removal to her which she refused to accept and she stated that she would not need any letter. She stated further that if her name was not on the work schedule after July 31, 1961, she would not report for work. After considerable difficulty to calm her, she was informed that neither her acceptance nor non-acceptance of the letter would affect her removal on July 31, 1961 but that the letter dated July 6, 1961 was important to her and that she should familiarize herself with its contents. She refused to permit me to explain fully the contents of the letter of final notice of removal, dated July 6, 1961, and walked out of my office talking loudly and incoherently.

FURTHER DEPONENT SAYETH NOT.

/s/ BERNARD U. RITZERT

Subscribed and sworn to before me on this 22nd day of May, 1963.

/s/ Meredith B. Hansen
NOTARY PUBLIC

[CERTIFICATE OF SERVICE]

[Filed June 5, 1963]

ORDER

Upon consideration of defendants' motion to dismiss or in the alternative for summary judgment filed herein, memorandum of points and authorities filed in support thereof, the affidavits and copy of the proceedings before the United States Civil Service Commission attached thereto, the memorandum of points and authorities filed in opposition to the motion to dismiss or in the alternative for summary judgment, the affidavits attached thereto and the argument of counsel in open court, it appearing to the Court that there being no genuine issue of material fact and that the defendants are entitled to judgment as a matter of law, it is this 5th day of June, 1963,

ORDERED that defendants' motion for summary judgment be and the same is hereby granted and the action filed herein be and the same is hereby dismissed, and it is.

FURTHER ORDERED that plaintiff's motion for summary judgment be and the same is hereby denied.

/s/ Luther Youngdahl
Judge

[CERTIFICATE OF SERVICE]

[Filed June 18, 1963]

NOTICE OF APPEAL

Notice is hereby given this 18th day of June 1963, that Laura Ella Griffin, plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of June, 1963 in favor of JOHN S. GLEASON, JR., et al., defendants against said plaintiff.

/s/ Donald H. Dalton
Attorney for Plaintiff
Federal Bar Building
1815 H Street, N.W.,
Washington 6, D. C.

Clerk: Please mail copy to

David C. Acheson,
United States Attorney
U. S. Court House,
Washington, D. C.

THIEL & CASILLAS
209 C Street, N.W.
Washington 1, D.C.
Telephone 393-0625, 393-7217

BRIEF AND APPENDIX FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,016

LAURA ELLA GRIFFIN, APPELLANT

v.

JOHN S. GLEASON, JR., ET AL., APPELLEE

Appeal From The United States District Court
For The District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 26 1963

Nathan J. Paulson
CLERK

QUESTIONS PRESENTED

1. Whether, under Section 10(e) of the Administrative Procedure Act, and Rule 56, F.R. Civ. P., a discharged government employee may merely deny receipt of notice of proposed removal and charges, which according to the administrative record and findings of the Civil Service Commission she refused to accept, and by that mere denial obtain a *de novo* trial on the issue together with testimonial examination of the public officers who made and assembled the record?

2. Whether, for purposes of Summary Judgment under District Court Rule 9(h) appellant admitted that she received the requisite notice and tore it up when she failed to (1) take issue with that assertion, and (2) advise the District Court she considered the matter material?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,016

LAURA ELLA GRIFFIN, APPELLANT

v.

JOHN S. GLEASON, JR., ET AL., APPELLEE

Appeal From The United States District Court
For The District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This employee discharge case presents for decision an issue regarding whether the integrity and composition of the administrative record may be challenged so as to require a trial *de novo* on whether required initial procedure was followed by the discharging agency. Appellant had been employed in a Veterans Administration Hospital in East Orange, New Jersey, as a Food Service Worker. She was removed from her position on July 31, 1961 (J.A. 5). Her removal was governed by

the provisions of Title 5 U.S.C., § 652(a) (1958 Edition).

The cause for appellant's removal was insubordination resulting from her repeated refusals to take a complete physical examination, the purpose of which was to assist the Veterans Administration Hospital in determining the basis for difficulties between appellant and her supervisors.¹ A letter dated June 26, 1961 was prepared in order to afford appellant the requisite notice of charges and proposed removal pursuant to Section 652(a), *supra*. (A.A.* II 17-19). The administrative record also reflects, through a contemporaneously-made handwritten memorandum (A.A. II 20) by Fabian G. Parish, that on June 26 appellant was summoned to Mr. Parish's office for the purpose of being handed the advance notice letter. Appellant refused to report. According to the memorandum, Mr. Parish sought out appellant to give her the letter. In a highly disturbed state she asked for the letter and immediately destroyed it without reading it. At the time she stated "she did not want any of *this type* of letter in her mail." [Emphasis supplied].²

The administrative record further reflects that on June 28, 1961, appellant was orally advised by B. U. Ritzert, Personnel Management Specialist, of the purpose and content of the letter of June 26 (A.A. II 21). During this meeting appellant again became agitated and upset and walked away.

¹ Appellant also challenges her removal on the merits, in that she was not guilty of the charged insubordination (Br. 5), (J.A. 2, 9-11). Since the law is unquestionably clear that judicial review of the merits of the discharge, (i.e. guilt or innocence of the charged misconduct), is unavailable, appellees will not consume more of the Court's time or energy in discussion on the point. Appellant's denial of insubordination does not create a genuine issue of material fact. *Kohlberg v. Gray*, 93 U.S. App. D.C. 97, 207 F.2d 35 (1953); *Levine v. Farby*, 70 U.S. App. D.C. 381, 386, 107 F.2d 186, 191 (1939); *Hofflund v. Seaton*, 105 U.S. App. D.C. 171, 172, 265 F.2d 363, 364 (1961).

² Appellant's failure to deny having made this statement became relevant in determining whether there exists a genuine issue of material fact as between the administrative record and appellant's affidavit (J.A. 7-8). See Argument b., *infra*, p. 12.

* Appellees' Appendix, *infra*.

By letter dated July 6, 1961 the hospital attempted to advise appellant that her removal would be effective July 31, 1961 (A.A. II 22-23). The stated grounds were "deliberate refusal to carry out repeated supervisor's instructions to report for completion of an examination by our physicians." Mr. Ritzert attempted to deliver the letter of removal to appellant and she refused to accept it. The balance of Mr. Ritzert's encounter with appellant were then characterized by him as followed:

"In spite of repeated efforts either to have her accept the letter or allow me to explain its full contents, she continued to ramble on disregarding anything I had to say. The conversation was ended when Miss Griffin abruptly walked out of my office in a highly agitated condition. This was manifested by her shouting in the corridors and in the main lobby (these people around here are common and low-down bums)."

Since appellant would not accept the letter of removal, it was mailed to her by certified mail, return receipt requested. The letter was returned marked "unclaimed". See attachments to memorandum by Mr. Ritzert, dated July 6, 1961.

Thereafter appellant pursued her appellate remedy before the Civil Service Commission.³ Despite appellant's mere representations before the Commission that she did not receive the letter of June 26, 1961 until after the effective date of her discharge, the Appeals Examiner found as a fact,

"delivery of the letter of charges to you was attempted on June 26 but you destroyed this letter without reading it; further that two days later you were orally advised of the contents of the letter and the proposal to separate you. No personal or oral reply was submitted by you nor did you request a

³ 5 C.F.R. § 9.301(a) (January 11, 1961)

hearing." (See letter dated September 4, 1961 from John A. Galvin, Appeals Examiner, to appellant.)

This decision was appealed to the Board of Appeals and Review of the Civil Service Commission and by letter dated September 21, 1961 the Board of Appeals and Review advised appellant that her contentions were not supported in the record and that the decision of the Appeals Examiner was affirmed.

Appellant filed her complaint on November 20, 1962 seeking declaratory judgment and mandatory injunctive relief. Therein she alleged "she was removed from her said position without notice and without cause, and arbitrarily and capriciously and illegally" (J.A. 2).

Appellee filed a motion to dismiss or in the alternative for summary judgment on March 20, 1963 (J.A. 4). Pursuant to Rule 9(h) of the Rules of the United States District Court for the District of Columbia appellees filed a Statement of Material Facts As To Which There Is No Genuine Issue (J.A. 5). That statement contained, *inter alia*, the following:

"2. On June 26, 1961, plaintiff was given, by letter, an Advance Notice of Proposed Removal for insubordination . . .

"3. Plaintiff received this notice on June 26, 1961, and immediately destroyed it. On June 28, 1961, she was advised orally of the contents of the written notice, dated June 26, 1961.

"4. The Advance Notice advised plaintiff that she would be afforded a hearing provided she so request. The record contains no request for a hearing. Nor is there any indication of any reply by the plaintiff, either personally or in writing, to the Advance Notice."

On April 18, 1963 appellant filed an "Opposition to the Motion to Dismiss or in the Alternative for Summary Judgment and Plaintiff's Motion to Dismiss (sic) or in the Alternative for Summary Judgment" (J.A. 7). On April 19, 1963 appellant filed an affidavit in which

she stated that she was removed on July 31, 1961 "without notice" and that the letter of June 26 was "first seen by me after [it was] received by Mr. Stevenson" (her then attorney) (J.A. 8). Accompanying appellant's opposition and motion was "Plaintiff's Statement of Material Facts As To Which There Is No Genuine Issue Pursuant to Rule 9(h)." ⁴ That statement made no reference to that portion of appellees' statement of material facts quoted above. Appellant did not file a "Statement of Genuine Issues" as provided by Rule 9(h), *supra*.

By order dated June 5, 1963 the District Court granted appellees' motion for summary judgment, denied appellant's motion for summary judgment and dismissed the complaint (J.A. 15-16). This timely appeal followed (J.A. 16).

STATUTES, RULES AND REGULATIONS INVOLVED

See Appellees' Appendix I

SUMMARY OF ARGUMENT

I

The verity of the administrative record, in reflecting attempted delivery to appellant of the advance notice and charges, is judicially unassailable. Therefore appellant's complaint and affidavit, averring lack of "notice", did not create a genuine issue of material fact within the meaning of Rule 56(c) F.R. Civ. P. The case was before the District Court only for resolution of "questions of law" under the limitations imposed by Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e).

II

In any event, appellant failed to plead the existence and materiality of the issue of receipt of notice on which

⁴ See attachment to appellant's brief. Brief pp. 13-14.

she now demands trial. Under District Court Rule 9(h) she must do so, or she may be considered as having admitted the properly pleaded and supported assertion that she refused to receive such notice.

ARGUMENT

Appellant is not entitled to a trial *de novo* on the issue of whether she received the notice of proposed removal and charges preferred.

a. The administrative record is unassailable.

Title 5, U.S.C. Section 652(a) requires that the hospital furnish appellant a notice of proposed removal and a copy of the charges. By Regulation, (5 C.F.R. § 9.301, January 11, 1961), the Civil Service Commission has provided for appeals to the Commission from adverse agency action. This Regulation, in pertinent part, confines the appeal to the determination whether the discharging agency followed the procedures outlined in Title 5 C.F.R. § 9.201 and Section 652(a), *supra*. Section 10(e) of the Administrative Procedure Act, 5 U.S.C., Section 1009(e), limits the scope of judicial review of administrative action of the kind here involved. It provides:

"So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law. . . . It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary capricious, an abuse of discretion, or otherwise not in accordance with law; . . . or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party. . . ."

Thus, facing squarely the issue presented in this appeal, it is seen that a determination must be made whether appellant is entitled to a re-trial in the District

Court on the issue of whether she was served with the letter or proposed removal and charges.⁵

In her appeal to the Civil Service Commission the Appeals Examiner found, as a matter of fact,

"That delivery of the letter of charges to you was attempted on June 26 but you destroyed this letter without reading it; further, that two days later you were orally advised of the contents of the letter and the proposal to separate you . . . [and] that on July 6, 1961, you were orally advised of the decision reached in this case but you rejected delivery of the letter of decision; further, that this decision was mailed to your address of record on July 8, 1961, but was returned to your employing agency 'unclaimed'".

It is appellees' position that under controlling authority, which recognizes the limited extent of judicial review in employee discharge cases, appellant is not entitled to a judicial hearing on this issue; that the findings of fact of the Commission are binding if supported by some evidence in the record.

The Attorney General's Manual on the Administrative Procedure Act (1947) makes it clear that it was not the intent of Congress that trials *de novo* are to be conducted by the District Court to determine dis-

⁵ It should be noted in passing that the administrative record cited by the parties in the District Court fails to reflect that appellant furnished the Civil Service Commission with a statement of her version of the facts regarding her encounter with Mr. Parrish on June 26, 1961. Indeed the administrative record reflects that appellant did nothing before the Commission but make a bare denial of having received the notice of proposed removal and charges. For the first time in her answers to interrogatories, propounded by appellees, appellant came up with a version of that encounter. (See J.A. 11.) Her failure to have made this version known to the Commission precludes her from now attacking the Appeals Examiner's finding of fact regarding procedural propriety. Moreover, her denial of receipt of "Notice" in the complaint and affidavit (J.A. 2, 8), without more, could not create an issue of fact. The word "notice" in Section 652(a), *supra*, is a term of legal art. Appellant appear to use the word in an absolute sense. More particularity needed to be averred.

puted issues of procedural propriety. Regarding Clause 6 of Section 10(e), the Attorney General's Manual makes it quite clear that cases of this kind are not included in the group of cases where *de novo* proceedings are contemplated. *Id.* 109-110. There appears to be no judicial authority for the proposition that a discharged employee is entitled to a trial in a court of original jurisdiction to resolve a conflict between the administrative record and the discharged employee regarding the facts of procedural compliance. It is quite clear that a trial *de novo* on the issues of facts surrounding the merits of the discharge action is not available to a discharged employee. See footnote 1, *supra* and *Blackmon v. Lee*, 92 U.S. App. D.C. 268, 205, F.2d 13 (1953); *Keim v. United States*, 177 U.S. 290 (1900). Section 10(e), *supra*, limits review to "questions of law".

Compelling reasons and authority other than that discussed above require the conclusion that a mere denial of facts clearly of record in the administrative file does not give rise to a genuine issue of material fact requiring *de novo* trial.⁶ It is settled law that the integrity of

⁶ *Paroczay v. Hodges*, 111 U.S. App. D.C. 362, 297 F.2d 439 (1961) does not require a contrary conclusion. Unlike the instant case, *Paroczay* did not file a cross-motion for summary judgment *Id.* 363 n.3. Moreover, the issue involved a mixed question of law and fact regarding the voluntariness of a resignation. This Court held "the form in which the *versions* of the facts were presented by affidavits to the Commission the resignation was not demonstrated to have been voluntary, and that the District Court there was presented a material issue of fact. . . . *Id.* 364. [Emphasis supplied.] In the instant case the issue was submitted to the Commission on the administrative record and apparently without affidavit from appellant. While the affidavits before the Commissioner in *Paroczay* did not demonstrate voluntariness the administrative record here does demonstrate that appellant refused to accept the proffered notice. Here mere "representations" to the contrary do not liken this case to *Paroczay*. In addition it should be observed that this Court did not remand *Paroczay* for a *de novo* hearing on voluntariness. The case was remanded to the Commission for an appeal hearing which had been denied. Subsequently the District Court granted *Paroczay's* motion for summary judgment ruling that, as a matter of law, (see Section 10(e), *supra*.) the facts adduced at the Commission hearing demonstrated involuntariness.

the administrative process is entitled to respect. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (Fourth *Morgan* case). "A presumption of regularity supports the official acts of public officers and in the absence of *clear evidence* to the contrary, courts presume that they have properly discharged their official duties." [Emphasis supplied.] *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). The mandate of the Supreme Court in the Fourth *Morgan* case goes for naught if appellant's mere assertions that she was removed from her position "without notice" and "illegally" (J.A. 2, and J.A. 8) are sufficient to (1) shatter the integrity of the administrative record, regular on its face, and (2) thereby create a genuine issue of material fact requiring re-trial in the District Court. In fourth *Morgan* the Court concluded the administrative record possessed the quality of a judicial proceeding and the administrative officer ought not to be subjected to testifying regarding his performance of official duty—(albeit, his mental processes regarding an act of Executive discretion). See also *Minkoff v. Payne*, 93 U.S. App. D.C. 123, 210 F.2d 689 (1953). That such a principal is applicable to administrative proceedings of the kind here presented appears unquestioned. See *United States v. Carlos Bianchi and Co.*, 373 U.S. 709, 714⁷ (1963). See also *Ping v. Kennedy*, 111 U.S. App. D.C. 106, 294 F.2d 735 (1961) where this Court concluded the administrative record of alien seaman applications for adjustment of status was "unassailable" in the face of a charge of belief as to the

⁷ The following quotation is pertinent:

"Indeed, in cases where Congress has simply provided for review, without setting forth the standards to be used or the procedures to be followed, this Court has held that consideration is to be confined to the administrative record and that no *de novo* proceedings may be held. *Tagg Bros. and Moorhead v. United States*, 280 U.S. 420; *National Broadcasting Co. v. United States*, 319 U.S. 190, 227. And, of course,—the function of reviewing an administrative decision can be and frequently is performed by a court of original jurisdiction—."

existence of an "illegal agreement" to deny the applications without consideration of their merits.

This rule of near inviolability was applied in *Wagner v. Higley*, 98 U.S. App. D.C. 291, 235 F.2d 518 (1956), a government employment case regarding job elimination. There this Court affirmed a grant of summary judgment to the defendants on the administrative record despite two factual assertions to the contrary by plaintiff. As to one issue this Court held:

"The District Court accepted the administrative view [that the questioned positions were not in fact interchangeable]. Our review of questions of this kind is necessarily limited, and we find in the record no basis for disturbing the *determination* made by the *agency and the trial court*." [Emphasis supplied.] *Id.* 292.

As to an assertion of adverse personal interest in a selection panel member the Court held:

"We think it reasonable to conclude that Klimas (the member) did not have a 'direct personal interest' adverse to appellant." *Id.* 292.

Thus, issues of fact between an administrative record and a plaintiff's assertions are not creative of a "genuine issue as to [a] material fact." Rule 56(c) F. R. Civ. P.

In this case, if the mere contention "without notice" impeaches the verity of the administrative record, any discharged employee may, by nothing more specific or particular, obtain a trial *de novo* on whether proper procedure was followed. This would require testimony of the various public officials as to facts already of record and a finding that the record is regular, irregular or fraudulent. See *Ping v. Kennedy, supra*, where the right to take testimony of Government officials on equally nebulous and general assertions of illegality was considered by this Court as "a matter of considerable doubt." See also *Marcello v. Bond*, 212 F.2d 830, 838 (5th Cir. 1954) affirmed 349 U.S. 302 (1955), and *United States v. Morgan, supra*. Therefore, it appears inescapable that, absent a particular

and specific allegation of fraud or irregularity in composition of the administrative record, appellant cannot deny the verity of that record and get a judicial trial on the issue.⁸ She had an appropriate hearing before the Commission, about which she does not now complain, and the issue was, as with a jury trial, conclusively resolved against her.

b. Appellant did not create a genuine issue under District Court Rule 9(h).⁹

Under Rule 9(h) of the Rules of the District Court, appellees advised the Court that there was no genuine issue of fact regarding the attempted service of the letter of June 26, 1961 (J.A. 5). By that Rule appellant was obliged, if she felt there was a material issue in that regard, to so advise the Court by a "statement of genuine issues". This she failed to do. Instead, appellant filed an "opposition" to appellee's motion and a "Motion to Dismiss (sic) or in the Alternative for Summary Judgment". This cross-motion was accompanied by a "Statement of Material Facts As To Which There Was No Genuine Issue Pur-

⁸ As to the insufficiency of general and conclusionary allegations of "arbitrary," "unlawful," "conspiracy," in the face of a well supported motion for summary judgment, see *Riley v. Titus*, 89 U.S. App. D.C. 79, 80-81, 190 F.2d 653, 654-5 (1951) and *Ping v. Kennedy*, *supra*. See also *Marion County Cooperative Ass'n v. Carnation Co.*, 214 F.2d 557 (8th Cir. 1954) regarding the allegation of "fictitious."

⁹ 9(h) MOTIONS FOR SUMMARY JUDGMENT. In addition to the points and authorities required by subparagraph (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a statement of the material facts as to which the moving party contends there is no genuine issue.

Any party opposing the motion, may, not later than three days prior to the hearing, serve and file a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion.

suant to Rule 9(h)". That statement was notably silent regarding whether appellant disputed the statement of appellees that "Plaintiff received this notice on June 26, 1961, and immediately destroyed it" (J.A. 5). (See attachment to appellant's brief, pp. 13-14.) Appellant's statement merely recited:

* * *

"3. Plaintiff took a physical examination.

"4. On July 31, 1961, she was removed from her position."

* * *

Thus, it is seen that not even in her own statement of material facts did appellant advise the Court that she considered there was a dispute as to this fact and that it was considered by her to be material. Indeed, it may fairly be said she did not consider the issue material. Under the third paragraph of Rule 9(h) the District Court was, therefore, correct in assuming that the facts as claimed by appellee's and as supported in the administrative record, were "admitted". Even in her brief appellant admits "she received the notice of removal" (Br. 10) in arguing her "unconsciousness" at the times of attempted delivery of notice to her.

Indeed, appellant has never attempted to explain or specifically deny that she made the statement found in the administrative record in Parish's handwritten contemporaneous memorandum of July 26, 1961, that she said "she did not want any of *this type* of letter in her mail". [Emphasis supplied.] She may, under the foregoing circumstances, be deemed to have known what "this type" of letter was and to have admitted that fact for purposes of summary judgment.¹⁰ It also appears from the statements by appellant's counsel during argument of the motions before the District Court that he did not challenge the appellee's statement that appellant was given the advance notice letter and tore it up.¹¹

¹⁰ See also footnote 5, *supra*, which shows that appellant has belatedly attempted to explain, but admits, an encounter with Parish on June 26, 1961.

¹¹ Transcript of that argument has been supplied by appellees as a supplemental record on appeal.

In conjunction with District Court Rule 9(h) it should be observed that the last two sentences of Rule 56(e), which were added to the Rule, effective July 1, 1963 (about one month after the District Court ruling in this case), contains a similar formula for disposing of summary judgment motions.¹² This amendment, like Rule 9(h), *supra*, is calculated to distill from the pleadings issues of fact "in good faith controverted" (Rule 9(h)). See 6 Moore's Federal Practice, Ch. 56, insert preceding p. 2001 (1963). No such issues were distilled by appellant in this case.

CONCLUSION

Accordingly, appellees submit either (1) that the verity of the administrative was not sufficiently challenged as to require trial *de novo* or (2) appellant failed "in good faith" to controvert appellees' statement of material facts as to which there was no genuine issue, and in either event the award of summary judgment to appellees was proper. The order of the District Court should be affirmed.

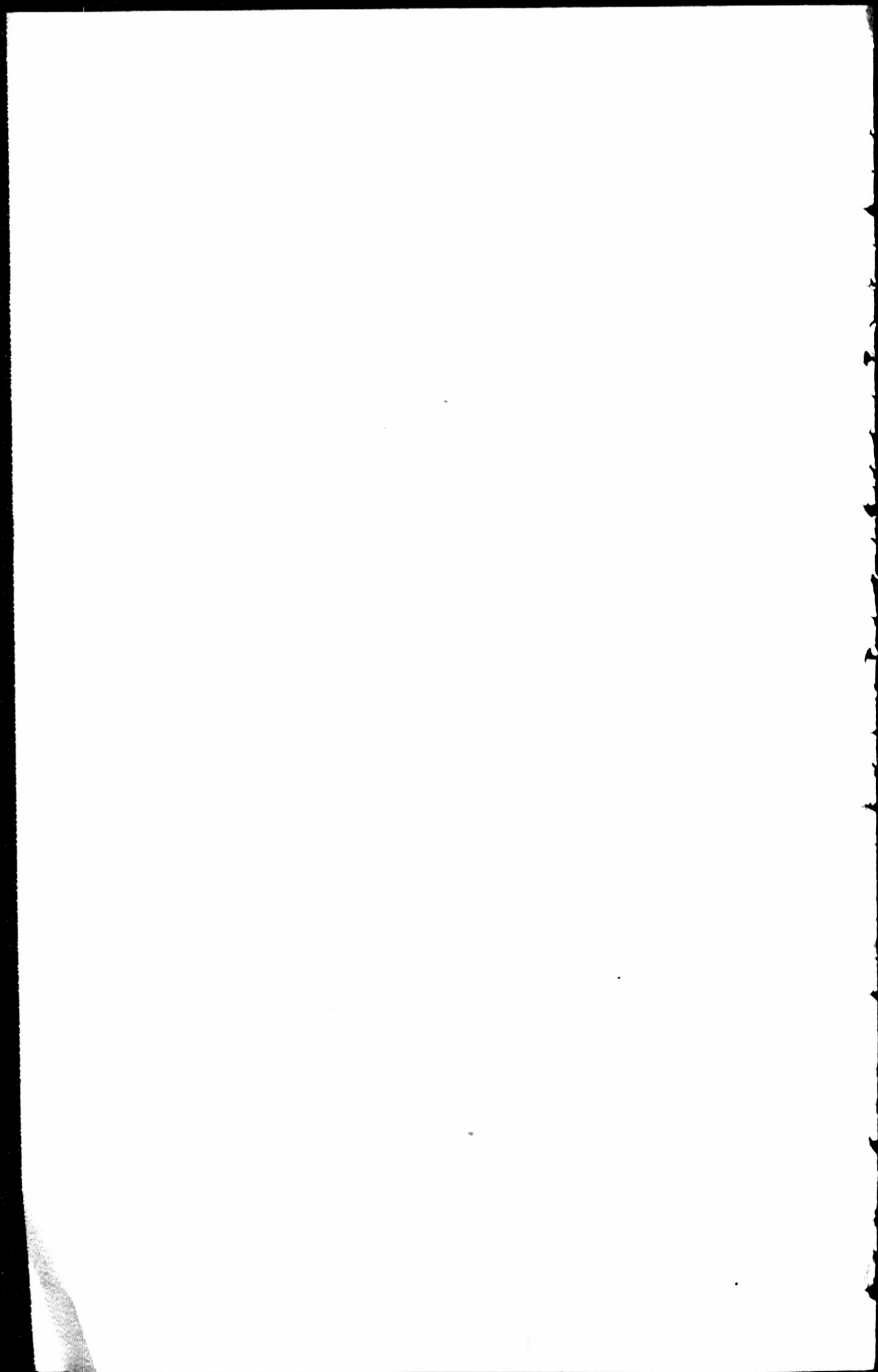
DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

¹² The amendment of July 1, 1963 to Rule 56(e) F.R. Civ. P. provides:

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

APPENDIX



APPELLEES' APPENDIX I

STATUTES, RULES AND REGULATIONS INVOLVED

Title 5 U.S.C. § 652(a) provides in pertinent part:

(a) No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer.

Rule 56(e), Fed. R. Civ. P. then provided:

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.* (Underlined portion added effective January 1, 1963).

District Court Rule 9(h) provides:

MOTIONS FOR SUMMARY JUDGEMENT. In addition to the points and authorities required by subpara-

graph (b) of this Rule there shall be served and filed with each motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure a statement of the material facts as to which the moving party contends there is no genuine issue.

Any party opposing the motion, may, not later than three days prior to the hearing, serve and file a concise "statement of genuine issues" setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.

In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion.

Title 5, C.F.R. § 9.201 (January 11, 1961) provides:

(a) Adverse action may not be taken against an employee except for such cause as will promote the efficiency of the service.

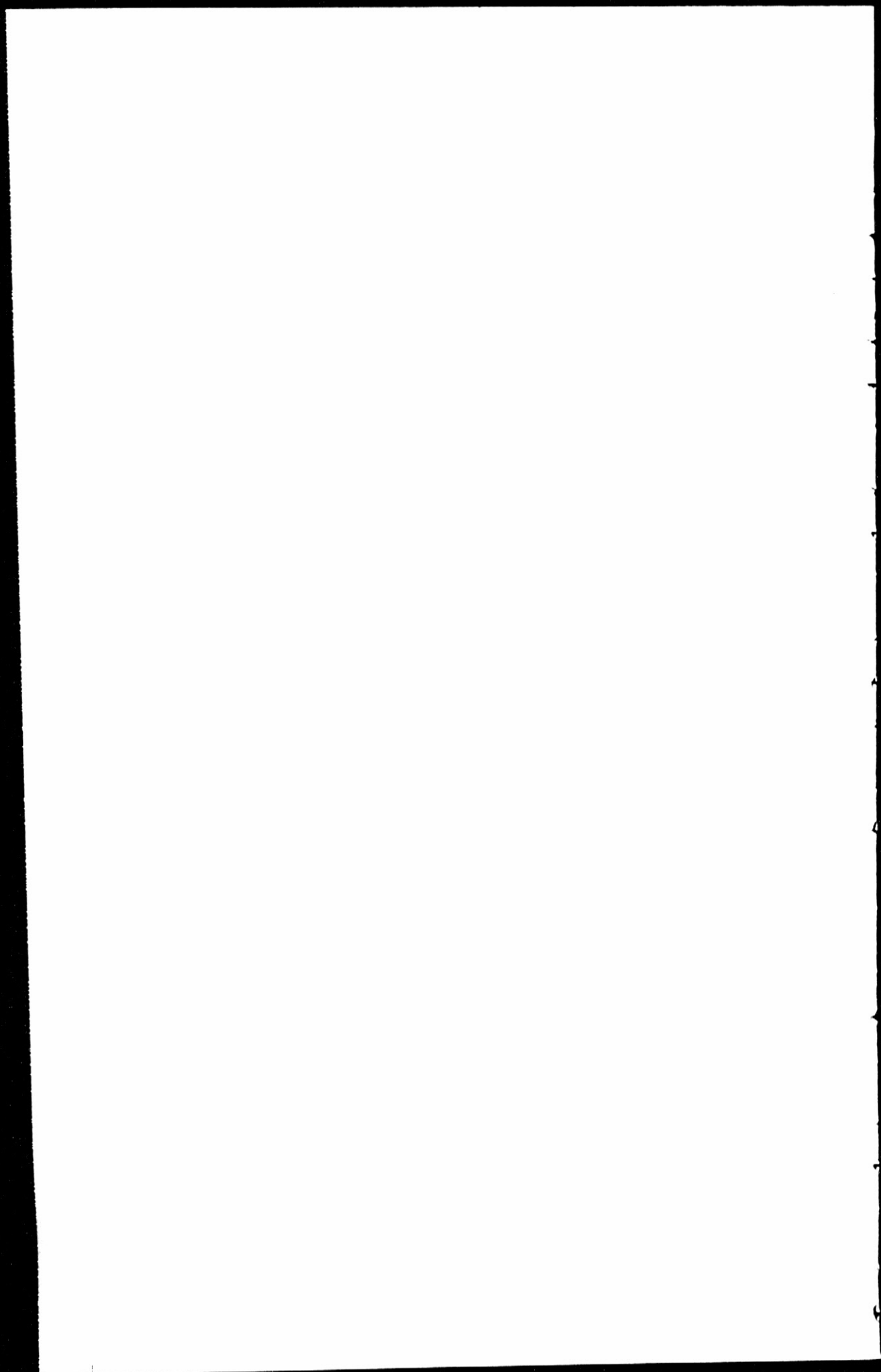
(b) Adverse action may not be taken against an employee for political reasons, except as required by law.

(c) Adverse action may not be based on discrimination because of marital status, physical handicap, or race, color, religion, or national origin.

Title 5, C.F.R. § 9.301(a) (January 11, 1961) provides:

On procedures. An employee entitled to the benefits of this Part may appeal in writing to the Commission on the grounds that the procedures required by § 9.202 have not been followed.

APPELLEES' APPENDIX II



June 26, 1961

5253/120

PERSONAL—OFFICIAL

TO: Miss Laura Griffin
Dietetic Service
Veterans Administration Hospital
East Orange, New Jersey

SUBJECT: Proposed Removal

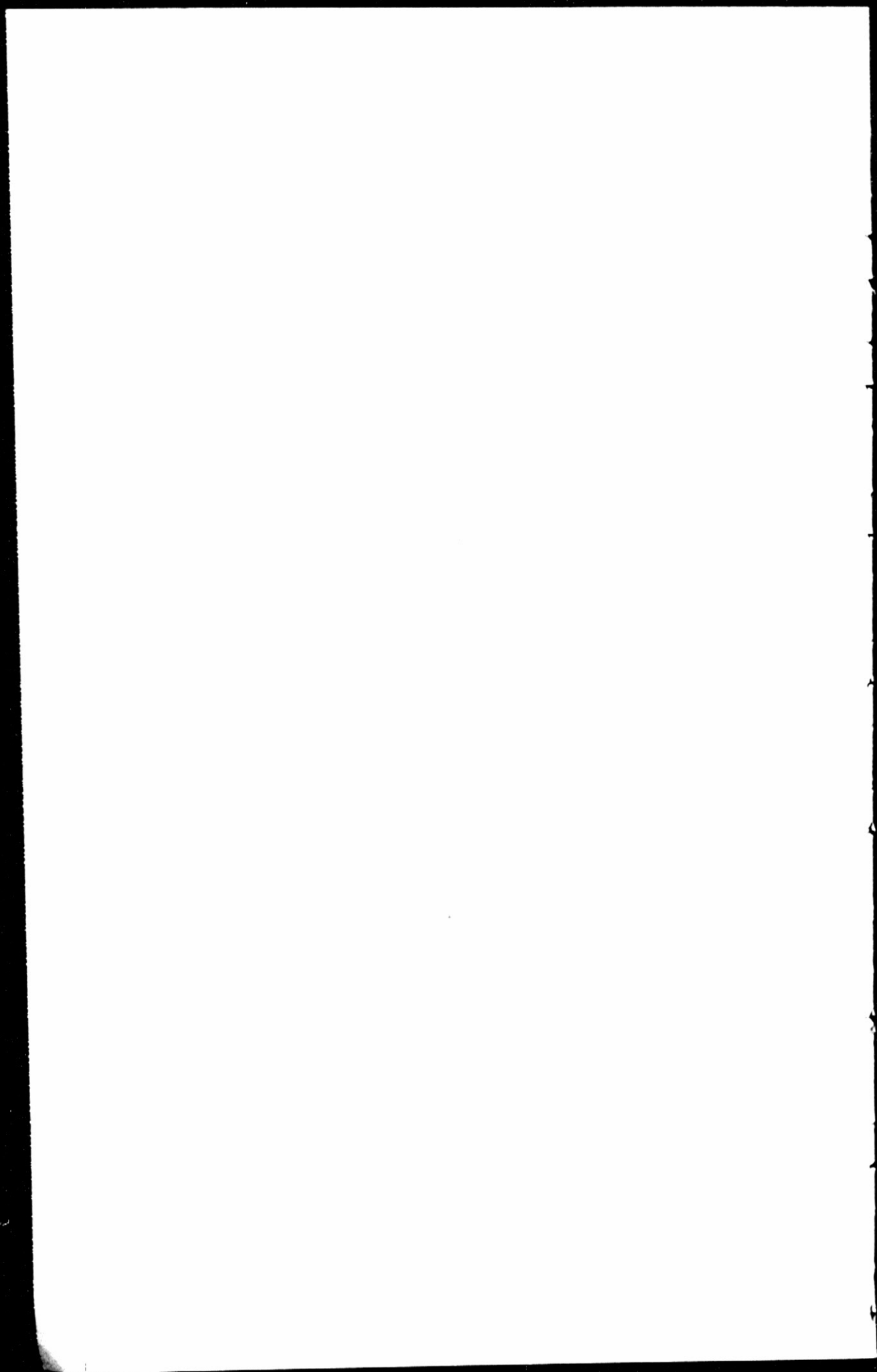
1. In accordance with applicable VA and Civil Service regulations, you are hereby notified that it is proposed to effect your removal for cause based on the following charge:

- I. On June 20, 1961 you were asked to report to the Admitting Service for an examination requested by the Chief, Dietetic Service. You were advised that the purpose of the examination was to assist us in determining your difficulties in getting along with supervisors. Initially you were reluctant and did not report to the Admitting Service as requested until a written memorandum had been issued to you. Subsequently, on June 23, 1961, you were again asked to report to the P & N Service for completion of this examination. You refused stating that you had your own physician and did not need any other physicians. After several verbal attempts were made by a number of dietetic supervisors, you refused to report as scheduled, at 1:15 P.M. You were then asked, and failed to report to the Admitting Service at 1:30 P.M. Another appointment was rescheduled for 3:10 P.M. on June 23, 1961 supplemented with a written request by the Chief Dietitian to which you failed to comply. Your misconduct is considered deliberate refusal to carry out supervisors' instructions known as insubordination.

2. You will be given until the close of business on July 3, 1961, to reply to these charges personally and in writing, if you desire. To substantiate your reply, you may submit such affidavits in support thereof as you wish.
3. You will be given a hearing before a Hearing Committee under the provisions of the VA hearing procedure, provided you make written request by the close of business July 3, 1961. In this event, you should indicate your position with respect to the charge (whether you admit the charge in whole or in part, or deny the charge in whole or in part, or admit the charge but wish to present extenuating circumstances or request leniency). At the hearing, you may be represented by a person of your choice and may present evidence and witnesses who are willing to testify. The Personnel Office, will, upon your request, advise you further regarding the selection of the hearing committee and the conduct of the hearing.
4. On two previous separate occasions you were negligent in the performance of your duties. After the first occasion you were reprimanded (letter of February 24, 1960) and after the second you were suspended for 10 days (letter of June 27, 1960). This past record will be taken into account in determining proper disciplinary action, if the above charge is sustained. You may reply personally and in writing with respect to these previous infractions and penalties and you may submit supporting evidence, including affidavits. At the hearing on the current charges, if one is held, you may make a statement for the record expressing your views concerning the consideration to be given such past record in determining proper penalty action. However, such prior disciplinary actions may not be reopened for official review.
5. The final decision to effect the action proposed has not been made. The Manager, who will make the final decision, will give full and impartial consideration to your reply, if a reply is submitted, and to the facts developed at the hearing, if a hearing is held.

6. If it is the decision of the Manager that you be removed, your removal will be effective not less than 30 days from the day after the date of receipt of this notice.
7. You will be retained in an active duty status during the period of advance notice.

REIZEL H. HORNEL
Chief, Dietetic Service



OPTIONAL FORM NO. 10
MAY 1962 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT
Memorandum

TO : Mrs. Horeb

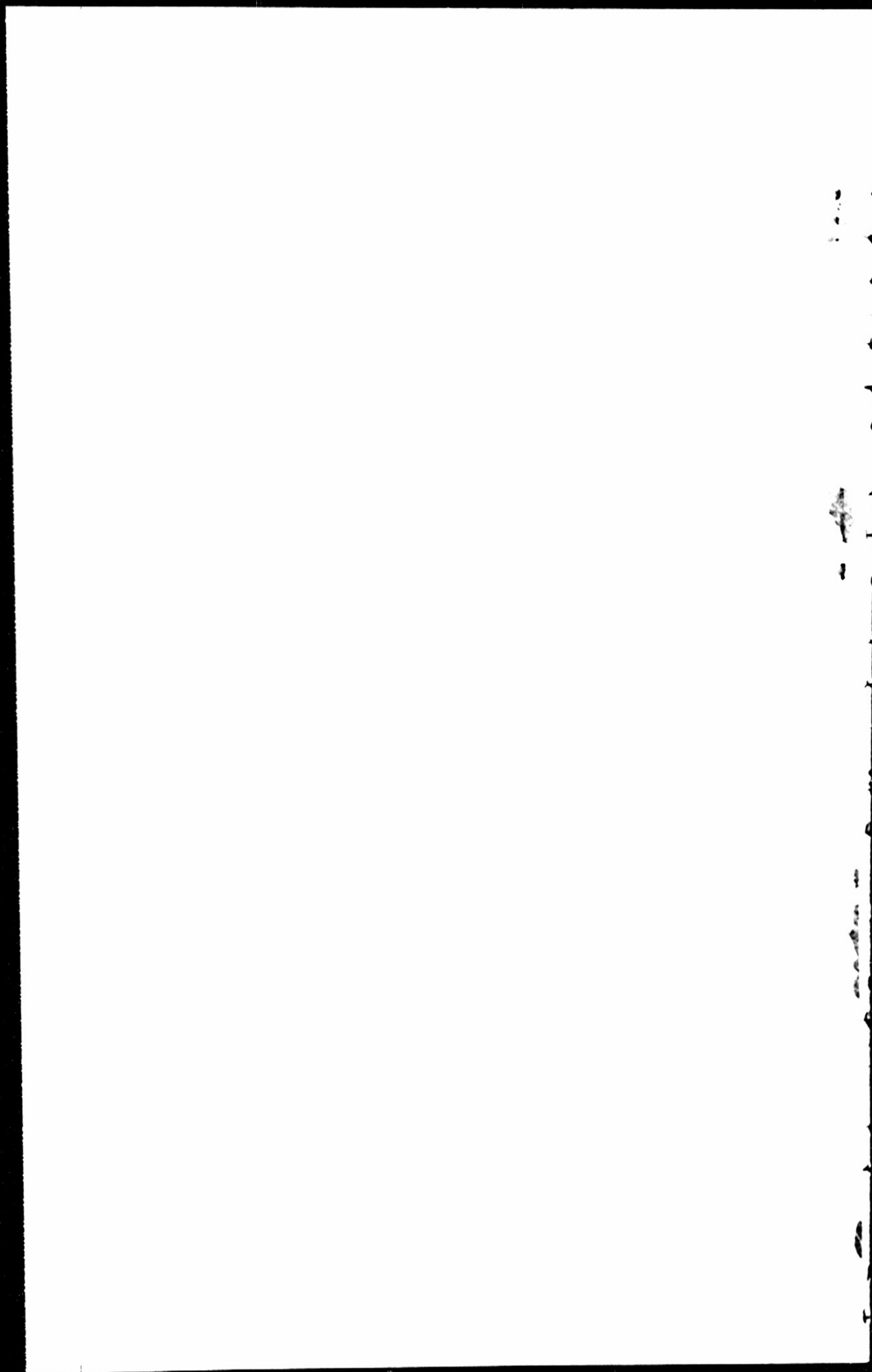
DATE: June 26 1961

FROM : Asst. Head, Inspection

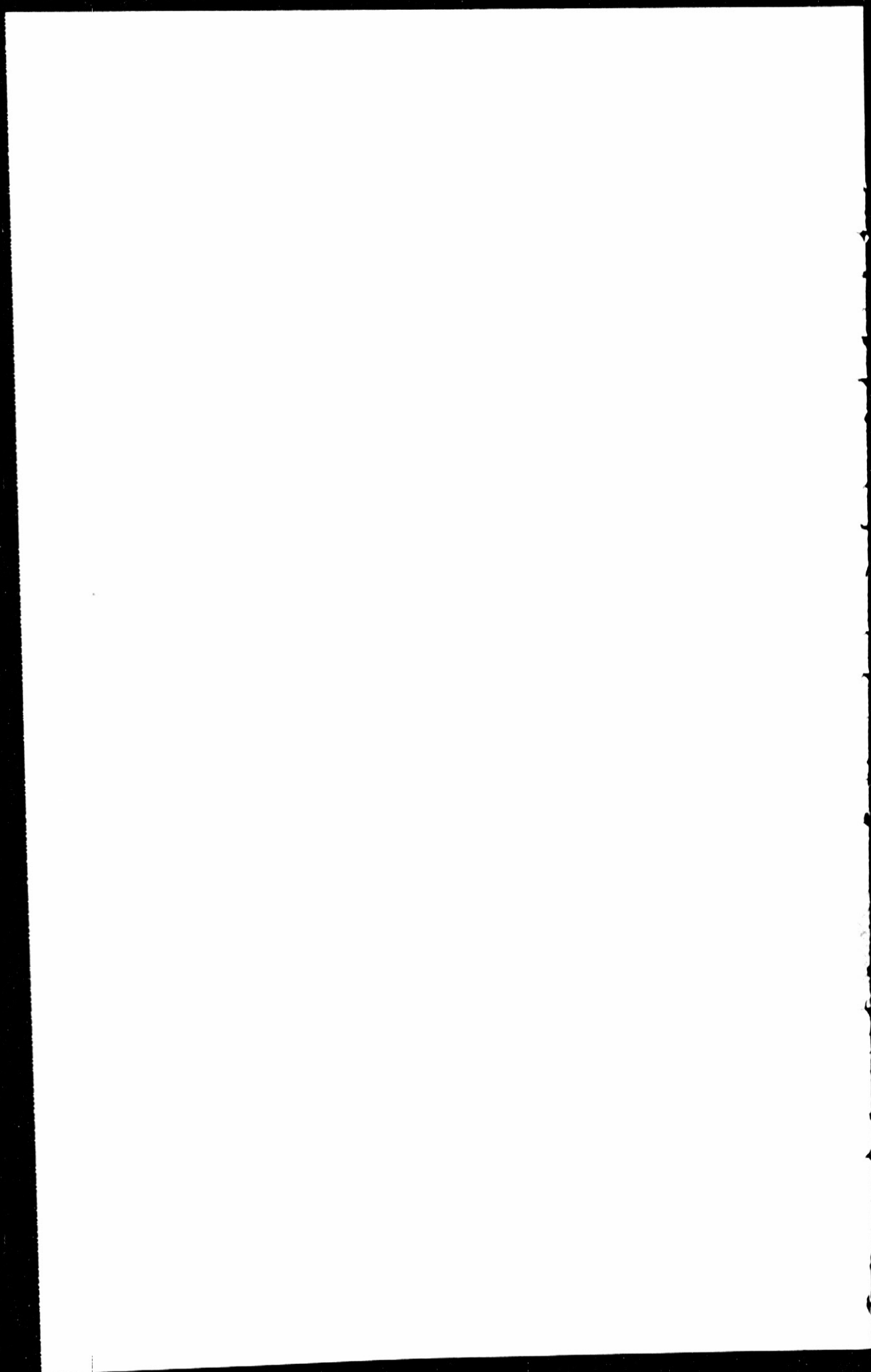
SUBJECT: Mrs. L. Shiffen

After Mrs. Horeb requested me to bring Mrs. Shiffen to her office. Mrs. Shiffen stated that she would meet me there shortly. Upon meeting a reasonable length of time, it was suggested that I take the letter to her and read its contents to her. Mrs. Shiffen refused to ^{come} to my office and immediately became emotionally disturbed stating, "Jesus Christ, why don't you people leave me alone?". She then asked for the letter and upon receiving it, immediately destroyed same without reading it. Stating further that she did not want any of this type of letter in her mail.

Robert L. Parish



REPORT OF CONTACT NOTE: This form must be filled out in ink or on typewriter, as it becomes a permanent record for co-suspects' folders.		IN OFFICE VA HOSPITAL EAST ORANGE, N. J.	INVESTIGATION NO. (G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, AB, AC, AD, AE, AF, AG, AH, AI, AJ, AK, AL, AM, AN, AO, AP, AQ, AR, AS, AT, AU, AV, AW, AX, AY, AZ, BA, BB, BC, BD, BE, BF, BG, BH, BI, BJ, BK, BL, BM, BN, BO, BP, BQ, BR, BS, BT, BU, BV, BW, BX, BY, BZ, CA, CB, CC, CD, CE, CF, CG, CH, CI, CJ, CK, CL, CM, CN, CO, CP, CQ, CR, CS, CT, CU, CV, CW, CX, CY, CZ, DA, DB, DC, DD, DE, DF, DG, DH, DI, DJ, DK, DL, DM, DN, DO, DP, DQ, DR, DS, DT, DU, DV, DW, DX, DY, DZ, EA, EB, EC, ED, EE, EF, EG, EH, EI, EJ, EK, EL, EM, EN, EO, EP, EQ, ER, ES, ET, EU, EV, EW, EX, EY, EZ, FA, FB, FC, FD, FE, FF, FG, FH, FI, FJ, FK, FL, FM, FN, FO, FP, FQ, FR, FS, FT, FU, FV, FW, FX, FY, FZ, GA, GB, GC, GD, GE, GF, GG, GH, GI, GJ, GK, GL, GM, GN, GO, GP, GQ, GR, GS, GT, GU, GV, GW, GX, GY, GZ, HA, HB, HC, HD, HE, HF, HG, HH, HI, HJ, HK, HL, HM, HN, HO, HP, HQ, HR, HS, HT, HU, HV, HW, HX, HY, HZ, IA, IB, IC, ID, IE, IF, IG, IH, II, IJ, IK, IL, IM, IN, IO, IP, IQ, IR, IS, IT, IU, IV, IW, IX, IY, IZ, JA, JB, JC, JD, JE, JF, JG, JH, JI, JJ, JK, JL, JM, JN, JO, JP, JQ, JR, JS, JT, JU, JV, JW, JX, JY, JZ, KA, KB, KC, KD, KE, KF, KG, KH, KI, KJ, KK, KL, KM, KN, KO, KP, KQ, KR, KS, KT, KU, KV, KW, KX, KY, KZ, LA, LB, LC, LD, LE, LF, LG, LH, LI, LJ, LK, LL, LM, LN, LO, LP, LQ, LR, LS, LT, LU, LV, LW, LX, LY, LZ, MA, MB, MC, MD, ME, MF, MG, MH, MI, MJ, MK, ML, MM, MN, MO, MP, MQ, MR, MS, MT, MU, MV, MW, MX, MY, MZ, NA, NB, NC, ND, NE, NF, NG, NH, NI, NJ, NK, NL, NM, NN, NO, NP, NQ, NR, NS, NT, NU, NV, NW, NX, NY, NZ, OA, OB, OC, OD, OE, OF, OG, OH, OI, OJ, OK, OL, OM, ON, OO, OP, OQ, OR, OS, OT, OU, OV, OW, OX, OY, OZ, PA, PB, PC, PD, PE, PF, PG, PH, PI, PJ, PK, PL, PM, PN, PO, PP, PQ, PR, PS, PT, PU, PV, PW, PX, PY, PZ, QA, QB, QC, QD, QE, QF, QG, QH, QI, QJ, QK, QL, QM, QN, QO, QP, QQ, QR, QS, QT, QU, QV, QW, QX, QY, QZ, RA, RB, RC, RD, RE, RF, RG, RH, RI, RJ, RK, RL, RM, RN, RO, RP, RQ, RR, RS, RT, RU, RV, RW, RX, RY, RZ, SA, SB, SC, SD, SE, SF, SG, SH, SI, SJ, SK, SL, SM, SN, SO, SP, SQ, SR, SS, ST, SU, SV, SW, SX, SY, SZ, TA, TB, TC, TD, TE, TF, TG, TH, TI, TJ, TK, TL, TM, TN, TO, TP, TQ, TR, TS, TT, TU, TV, TW, TX, TY, TZ, UA, UB, UC, UD, UE, UF, UG, UH, UI, UJ, UK, UL, UM, UN, UO, UP, UQ, UR, US, UT, UY, UZ, VA, VB, VC, VD, VE, VF, VG, VH, VI, VJ, VK, VL, VM, VN, VO, VP, VQ, VR, VS, VT, VU, VV, VW, VX, VY, VZ, WA, WB, WC, WD, WE, WF, WG, WH, WI, WJ, WK, WL, WM, WN, WO, WP, WQ, WR, WS, WT, WU, WV, WW, WX, WY, WZ, XA, XB, XC, XD, XE, XF, XG, XH, XI, XJ, XK, XL, XM, XN, XO, XP, XQ, XR, XS, XT, XU, XV, XW, XX, XY, XZ, YA, YB, YC, YD, YE, YF, YG, YH, YI, YJ, YK, YL, YM, YN, YO, YP, YQ, YR, YS, YT, YU, YV, YW, YX, YY, YZ, ZA, ZB, ZC, ZD, ZE, ZF, ZG, ZH, ZI, ZJ, ZK, ZL, ZM, ZN, ZO, ZP, ZQ, ZR, ZS, ZT, ZU, ZV, ZW, ZX, ZY, ZZ.
LAST NAME—FIRST NAME—MIDDLE NAME OR INITIALS—LAST NAME GRIFFIN, LAURA E.		DATE JUNE 20, 1961	
PHYSICIAN SERVICE, VA HOSPITAL, EAST ORANGE, NEW JERSEY			
PERSON CONTACTED MISS GRIFFIN		TYPE OF SERVICE (Check) ☒ PERSONAL ☐ TELEPHONE	
ADDRESS OF PERSON CONTACTED		TELEPHONE NO.	
BODY OF REPORT OF CONTACT (RECOUNT OF FACTS)			
At 3:00 P. M., June 20, 1961, I advised Miss Laura Griffin, Food Service Worker, in regard to the contents of the letter she received and immediately destroyed on Monday, June 19, 1961. I informed her of the fact that the letter was a notice of proposed removal and outlined the reasons for which her removal would be recommended to the Manager - her delinquency refusal to comply with supervisory requests to report for physical examination in order that a determination could be made with regard to her fitness for duty. Before I could continue, Miss Griffin stated that she was going to return her mail and that she doesn't want to receive any letters. She stated that the delinquencies are caused by everything else, not her, and that she wants to be left alone to do her work. Miss Griffin further stated that she doesn't want to see my doctor and that she will go to Washington on this matter. At this point she walked away and returned to her work area and would not allow me to continue as she indicated she was not interested in hearing any more about the matter. Mr. Catherine Lamb, Supervisory Food Service Worker, was present during the conversation with Miss Griffin.			
I AM REQUESTING DURING THE NEXT PERIOD OF TIME THAT YOU CONTACT THIS PERSONNEL.			
SIGNED: <i>[Signature]</i> SPECIAL AGENT IN CHARGE			



VETERANS ADMINISTRATION

HOSPITAL

EAST ORANGE, NEW JERSEY

July 6, 1961

[SEAL]

Your File Reference:

In Reply Refer To: 5253-135

PERSONAL-OFFICIAL

TO: Miss Laura E. Griffin
Dietetic Service
VA Hospital
East Orange, New Jersey

SUBJ: Removal

1. In connection with the letter of June 26, 1961, in which you were given advance notice of your proposed removal, a decision has been made to remove you for cause from employment in the Veterans Administration, effective on July 31, 1961, based on the following reason:

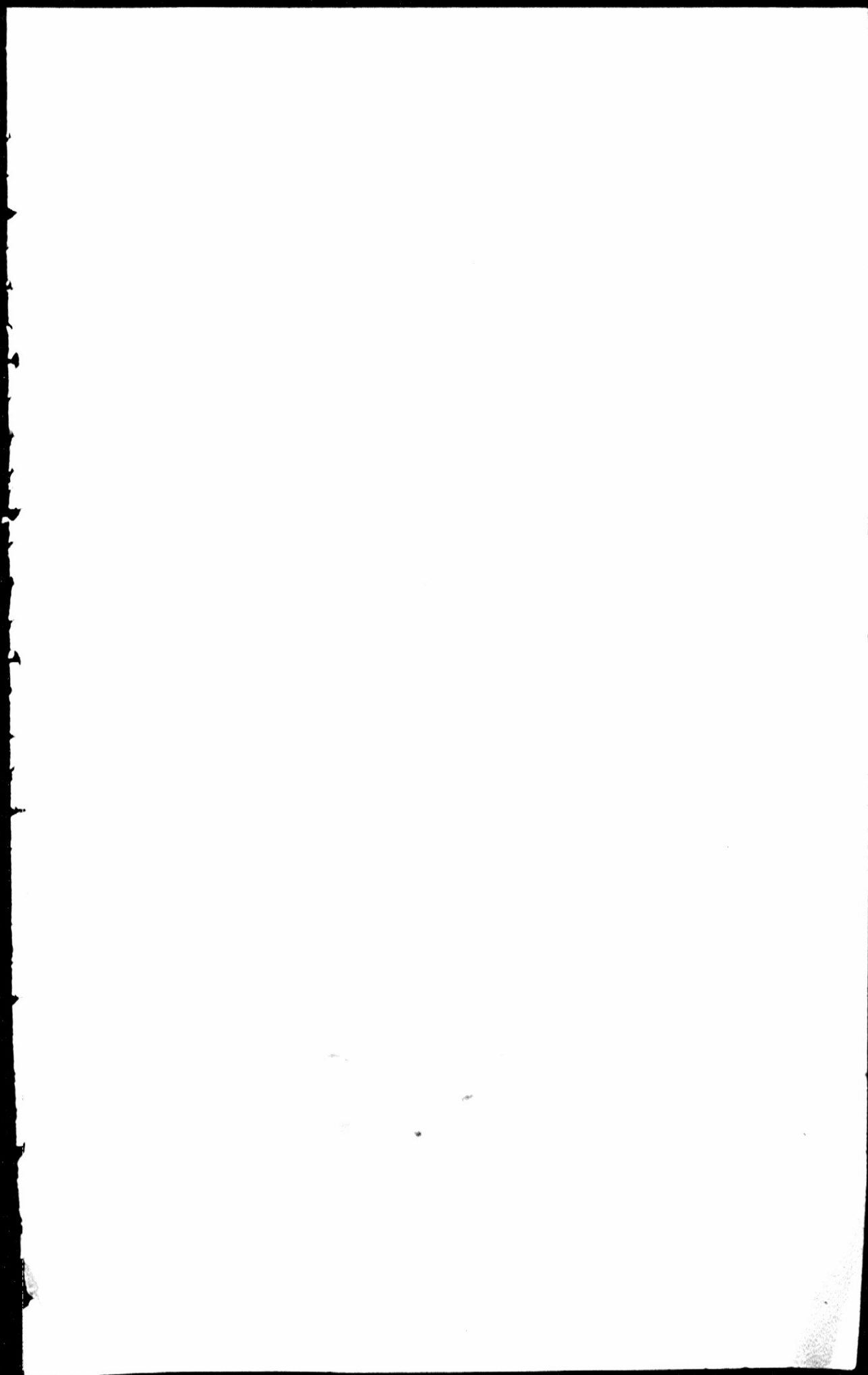
Deliberate refusal to carry out repeated supervisory instructions to report for completion of an examination by our physicians. The above charge, as stated in the notice of proposed removal, is sustained.

2. In reaching this decision, careful consideration has been given to all the facts developed. Also prior disciplinary actions (a reprimand dated February 24, 1960 and a suspension dated June 26, 1960) cited in the advance notice were taken into consideration in reaching this decision.

3. You have the right to appeal this action to the Civil Service Commission, Second Region, News Building, 220 East 42nd Street, New York 17, New York, no later than ten (10) days after the effective date of this action, by establishing a prima facie case that the procedure prescribed by the Commission was not followed; or that the

action was effected for political reasons, except as may be required by law, or resulted from discrimination because of marital status or physical handicap. Also, you may appeal within ten (10) days after effective date of this action to the Administrator, through the Manager, on the basis of the record. A further explanation of your appeal rights may be obtained by consulting the VA Personnel Office, Room 1-177.

/s/ M. Herbert Fineberg
M. HERBERT FINEBERG, M. D.
Manager



BRIEF FOR APPELLANT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,016

LAURA ELLA GRIFFIN, Appellant,

v.

JOHN S. GLEASON, JR., individually and as
Administrator, Veterans Administration,
JOHN W. MACY, JR., individually and as
Chairman, United States Civil Service
Commission, ROBERT E. HAMPTON, individually
and as Commissioner, United States Civil
Service Commission, LUDWIG J. ANDOLSEK,
individually and as Commissioner, United
States Civil Service Commission, Appellees.

Appeal from the United States District Court for
the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 5 1963

Nathan J. Paulson
CLERK

Donald H. Dalton
Attorney for Appellant
Federal Bar Building
1815 H Street, N. W.
Washington 6, D. C.

QUESTIONS PRESENTED

1. Was a genuine issue as to a material fact raised by appellant's assertion that she did not receive the notice of proposed removal, nor the decision to remove?

2. Was appellant denied due process of law, the protection of the Lloyd-La Follette Act and Executive Order 9830 when she was removed from her position without her knowledge or consciousness of the notice of the proposed removal and also the decision to remove?

3. Was the Veterans Administration on notice that appellant was suffering from a physical and mental ^{handicap} ~~hardship~~ which precluded adverse action against her?

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,016

LAURA ELLA GRIFFIN,

Appellant,

v.

JOHN S. GLEASON, JR., et al.,

Appellees.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal docketed July 25, 1963, under the provisions of Title 28, Section 1291, U. S. Code, from an Order of the United States District Court for the District of Columbia, entered June 5, 1963, granting summary judgment for defendants-appellees and denying summary judgment for plaintiff-appellant and dismissing the complaint. Notice

of Appeal was filed on June 18, 1963.

Statement of the Case

This is a Civil Service removal case.

The appellant at the time of her separation on July 31, 1961, from the Veterans Administration, held a permanent appointment as a Food Service Worker WA-7408 2/3, \$1.80 per hour day, \$1.98 per hour night, in the Veterans Administration Hospital, East Orange, New Jersey. She entered federal employment with the Veterans Administration on October 7, 1957. (Complaint, J. A. 104)

On or about June 20, 1961, appellant was requested to undergo a physical examination by the Chief Dietician of the Veterans Administration Hospital, East Orange, New Jersey. She took the examination at the said Veterans Administration Hospital, and also another examination by her private physician.

On July 31, 1961, appellant was removed from her said position without notice and without cause.

On August 2, 1961, appellant's attorney, Harvey G. Stevenson, of East Orange, New Jersey, wrote Veterans Administration, requesting reasons for her removal.

On August 3, 1961, George M. Rynick, Personnel Officer, Veterans Administration, East Orange, New Jersey, wrote Mr. Stevenson and enclosed a letter of Proposed Removal, dated June 26, 1961, and a letter of Removal, dated July 6, 1961. Appellant for the first time discovered the contents of the above letters after August 3, 1961, in the office of her attorney.

On August 5, 1961, the termination of her employment was administratively effective.

Appellant appealed administratively to the Second United States Civil Service Region and her appeal was denied on September 4, 1961. She appealed to the Board of Appeals and Review, United States Civil Service Commission and her appeal was denied on September 21, 1961. (Complaint J. A. 1-4, Affidavit, J.A. 7-8)

Proceedings Below

After her action in the United States District Court for the District of New Jersey, Civil Action No. 870-61, was dismissed under Rule 41 (b) of the Federal Rules of Civil Procedure but without prejudice, she filed Civil Action No. 3643-62 on November 20, 1962 in the United States District Court for the District of Columbia, seeking a declaratory and mandatory injunction, ordering the Administrator, Veterans Administration to reinstate appellant in her position as food service worker. (J. A. 1-4) The Court below granted appellee's motion for summary judgment and dismissed the complaint and denied appellant's motion for summary judgment. (J. A. 15-16) This appeal followed. (J. A. 16)

Statutes and Regulations Involved

United States Constitution, Fifth Amendment.

The Lloyd-La Follette Act, Act of August 24, 1912, as amended by Public Law 80-623, 5 USC 652.

Rule 56(c), Federal Rules of Civil Procedure.

Executive Order 9830, effective May 1, 1947, 12 F. R. 1259.
5 CFR 9. 201(c).

POINTS RAISED ON APPEAL

The motion for summary judgment should have been denied as appellant raised genuine issues of material fact.

Veterans Administration denied appellant due process of law in removing her from her position without her knowledge of the notice of proposed removal and also the decision of removal.

The provisions of the Lloyd-La Follette Act are not complied with if the employee was not conscious of the notice of proposed removal and the decision of removal from office.

According to 5 CFR 9. 201(c), 26 F.R. 181, Jan. 11, 1961, action cannot be taken against an employee because of physical handicap.

SUMMARY OF ARGUMENT

As there is a bonafide dispute of facts as to the receipt of the notice of removal and decision to remove, summary judgment will not lie.

Appellant, Griffin, contends that she did not receive notice of removal nor the decision to remove.

The Administrator, Veterans Administration, contends that the notice and the decision was received by appellant.

Appellant contends that her rights were violated under the Lloyd-La Follette Act, Executive Order 9830, and the due process clause of the Fifth Amendment.

Appellant who is colored, further contends that she did not

understand the meanings of the notice, and decision to remove, and was not aware or conscious of the notice and decision. And therefore a bonafide dispute of facts precludes summary judgment for appellees.

ARGUMENT

I. Summary Judgment Should Not Be Granted Where There Is a Bonafide Dispute of Facts as to Genuine Issues.

Carefully and with great caution should the summary judgment rule be invoked. Strongly and emphatically, the appellant controverts the facts of appellees that she received notice and the decision of removal from her job as food service worker in the Veterans Administration Hospital.

Appellant states in her affidavit that she did not receive the letter of proposed removal and decision until after her removal on July 31, 1963. (J. A. 7-8) Her position is further strengthened by her answers to interrogatories, (J. A. 9, 10, 11) in which she denies receiving the notice and also the decision. She also states that she took the physical examination as requested by the Veterans Administration, (J. A. 2, 9, 10, 11) and did not refuse to undergo the neuropsychiatric portion of the medical examination. (J. A. 10, 11)

On a motion for summary judgment the Court cannot try issues of fact. It can only determine whether there are issues to be tried. Miller v. Miller, 74 App. D.C. 216, 122 F.2d 209. The summary judgment procedure is not a substitute for a trial of disputed issues of fact. Hoffman v. Babbitt Bros. Trading Co., 203 F.2d 636.

Absence of genuine issue as to any material fact is not established simply because cross-motions for summary judgment have been filed, each

alleging absence of factual issue. Georgia S. & F. Ry. Co. v. U. S. Cas. Co., 177 F. Supp., 751, affirmed 272 F. 2d 712.

In Minnesota Mining and Mfg. Co. v. United States Rubber Co., 279 F. 2d 409, the Court said:

"It is of course imperative that the procedure be not availed of as a device to prevent a full examination of the underlying contested facts, for such an attempt not only deprives the opposing party of his rights but usually results in prolonging rather than shortening the litigation."

There is a bonafide dispute of facts, and summary judgment should not be granted.

Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F. 2d 766, clearly states that factual issues are not to be resolved by summary judgment and "once it is determined that there is such an issue, summary judgment may not be granted." (180 F. 2d 766, 772).

In Paroczay v. Hodges, 111 U.S. App. D.C. 362, 297 F.2d 439, Judge Fahy stated:

"... we conclude that the papers before the Court created a genuine issue of material fact as to the voluntariness of the resignation and that this precluded summary judgment. Rule 56(c), Fed. R. Civ. P. Sartor v. Arkansas National Gas Corp., 321 U.S. 620, Evers v. Buxbaum, 102 U.S. App. D.C. 334, 335, 253, F. 2d 356, 357."

See Ingalls v. Zuckert, 114 U.S. App. D.C. - 309 F. 2d 659, Dewey v. Clark, 86 U.S. App. D.C. 137, 180 F. 2d 766, and cases cited therein; also Vale v. Bonnett, 191 F. 2d 334.

II. As Appellant Was Suffering From a Mental Handicap, Veterans Administration Was Precluded From Taking Adverse Action Against Her.

5 CFR 9.201 states:

"(c) Adverse action may not be based on discrimination because of marital status, physical handicap, or race, color, religion, or national origin."

The appellant, an ignorant colored woman, employed as a food service worker in a hospital, had no comprehension of the oral or written notice of removal. She was psychologically and linguistically in another world. She was suffering from a mental handicap.

The affidavits of Veterans Administration witnesses clearly reveal that appellant had no knowledge of the notice of removal.

Fabian G. Parish in his affidavit, (J. A. 12-13) stated in part:

"On the same day, June 26, 1961, I took the letter to Miss Griffin, who was working in the kitchen of the hospital at that time, and I asked her to go to my office and she refused to do so. I then informed Miss Griffin that I had a letter for her from Mrs. Horel, and I attempted to read the contents of the letter to her. As soon as I started to read the letter she became emotionally disturbed and would not permit me to continue with the reading of it. She asked me for the letter and immediately ripped it up without reading it." (J.A. 13)

The affidavit (J. A. 13, 14, 15) of Bernard V. Ritzert of the Veterans Administration reveals that appellant had no comprehension of notice of removal from her position. The affidavit states in part:

"... I informed her that the contents of the letter of proposed removal, dated June 26, 1961, contained the reasons of proposed removal, namely, her repeated refusal to comply with the hospital's request that she undergo a complete medical and mental examination. At this point in the conversation the plaintiff became agitated and stated that nobody was going to remove her and that she doesn't want to receive any letters, that the difficulties were caused by everybody else, not her, and that she 'wants to be left alone to do her work.'" (J. A. 14)

"On July 6, 1961, at my office, ... I briefly restated my previous conversation with her on June 28, 1961. I then advised her that a decision had been made by the hospital to remove her and that her last day of duty would be July 31, 1961. I proffered the letter of Final Notice of Removal to her, which she refused to accept, and she stated that she would not need any letter. She stated further that if her name was not on the work schedule after July 31, 1961, she would not report for work. After considerable difficulty to calm her, (underlining supplied) she was informed that neither her acceptance nor non-acceptance of the letter would affect her removal on July 31, 1961, but that the letter dated July 6, 1961 was important to her and that she should familiarize herself with its contents. She refused to permit me to explain fully the contents of the letter of final notice, dated July 6, 1961, and walked out of my office talking loudly and incoherently." (J. A. 14-15)

Appellant answers Fabian G. Parish's version of the incident as follows:

"Mr. Parish did show me a piece of paper which he did not hand to me. He said, 'This is what you get for telling Mr. Stevens (Harry J. Stevens, Inc., East Orange, New Jersey) the real estate man for telling the people upstairs in your house to move.' He did not tell me what was in the paper. I thought it was a letter which someone had given to him or written to him.

"I did not know that the paper had anything to do with the hospital.

"I wondered at the time how he knew that I was trying to remove my tenants from the second floor.

"I am colored, my tenants are colored, and Mr. Parish was colored. I assumed that somehow my tenants had 'got to' Mr. Parish to try and influence me." (J. A. 11)

There is not the slightest doubt that appellant failed to comprehend what the government procedure of notice of proposed removal and decision to remove meant to her. In her mind, there was a connection of the removal procedure with her altercation with her tenants. She was living in a black world, a negro ghetto, as described by author James Baldwin.

of Nobody Knows My Name, Dell Publishing Company, 1961.

"Neither the Southerner nor the Northerner is able to look on the Negro simply as a man. It seems indispensable to the national self-esteem that the Negro be considered either as a kind of ward, ... or as a victim." James Baldwin, Nobody Knows My Name, Dell Publishing Company, 1961, p. 65-66.

Baldwin points out the limitations of negro education.

"The level of Negro education, obviously, is even lower than the general level. The general level is low because, as I have said, Americans have so little respect for genuine intellectual effort. The Negro level is low because the education of Negroes occurs in, and is designed to perpetuate, a segregated society. This, in the first place, and no matter how much money the South boasts of spending on Negro schools, is utterly demoralizing." p. 91.

Sanford J. Fox, Associate Professor of Law, Boston College of Law, working under a Ford Foundation Law Faculty Fellowship, wrote an excellent article on Physical Disorder, Consciousness, and Criminal Liability, in 63 Columbia Law Review, 645-668.

Clearly, appellant was unconscious and not aware of what was going on around her, as the affidavits of the agency witnesses reveal.

Professor Fox, *ibid*, states at page 657:

⁸⁷
"In People v. Hardy, the California Supreme Court permitted a defendant to invoke section 26(5), which exempts unconscious action from liability, notwithstanding that his defense was based on a purely emotional trauma. This decision seems to follow from the acceptance by California courts of 'consciousness' as the opposite of the psychoanalytical concept of unconscious.⁸⁸ A frequently cited characteristic emotional disorder is the control of conduct by unconscious (rather than conscious) thought processes.⁸⁹ The decision in Hardy is paradoxical in that it finds the accused be of sound mind when his behavior is controlled by unconscious thought process - a major symptom of mental disturbance."

Obviously the Veterans Administration had notice and was aware of the unconsciousness of appellant when she received the notice of removal. The agency had a duty to investigate her physical and mental condition before charges were filed. This was not done. Appellant needed medical attention, which was clearly apparent. Under the facts of the case, adverse action could not be taken under 5 CFR 9, 201(c).

87. 33 Cal. 2d 52, 198 P. 2d 865 (1948)

88. In People v. Martin, 87 Cal. App. 2d. 581, 587-88, 197 P. 2d 382 (Dist. Ct. App. 1948), the Court approved the trial court's charge that "if it (the jury) found that at the time 'the conscious mind of the defendant had ceased to operate and that his actions were solely controlled by his subconscious or subjective mind... then you will find that the defendant ... did not commit a crime even though such an act would constitute a crime if it had been committed by the defendant when he was conscious.'" This, of course, confuses the lack of awareness or perception with the mentation concerning forgotten matter, meant by Freud's Unberwust. See Cobb, Foundations of Neuropsychiatry, 119 (6th ed. 1958).

89. See Freud, A General Introduction to Psychoanalysis, 284-06 (Permabook, Ed. 1958)

Appellant should not be denied her day in court only because she did not understand the language of legalistic and restricted words of an administrative agency totally unfamiliar to her.

III. Appellant Was Denied Due Process of Law, the Protection of the Lloyd-La Follette Act and Executive Order 9830 By Removing Her From Her Position.

The Lloyd-La Follette Act states in part:

"That act provides that no person in the Classified Service shall be removed therefrom except for such cause as will promote the efficiency of the service and after a prescribed procedure has been followed."

Appellant contends that the prescribed procedure must be an intelligible procedure to the employee. If the procedure is not understood nor comprehended, it is not a prescribed procedure.

The cause must be such that will promote efficiency of the service.

Again looking at Executive Order 9830, effective May 1, 1947, 12 F. R. 1259, it states in part:

"The Commission shall prescribe procedures to be followed by agencies in connection with removals, demotions, and suspensions in the competitive service which will insure equitable and uniform treatment."

An agency official in removing appellant with her limited knowledge of the procedure is not acting in an equitable manner. His action is arbitrary, capricious, illegal and violates the standards of fairness.

In our enlightened age today, the colored employee should be given every opportunity of a white employee, who understands the language and meaning of agency words in the Lloyd-La Follette Act. In re: Standard Gas and Electric Co., 151 F.2d 326, 331 (3rd Cir. 1945), Judge Leahy said:

"It can be set out as a well established rule of administrative law that the action of an administrative body in determining the particular remedial measures demanded in an individual case is not to be overturned by court action unless the administrative body has lost sight of the law."

Appellant contends that the Civil Service Commission has lost sight of the law in contending that notice was given her.

Appellant further contends that under E. O. 9830, she did not receive uniform and equitable treatment. This was a violation of her rights under the due process clause of the Fifth Amendment to the United States Constitution.

No particular form of procedure is required to constitute "due process of law" in an administrative hearing, but its requirements must be measured in the light and purpose of such hearings. National Labor Relations Board v. Prettyman, CCA, 1941, 117 F. 2d 786.

Question of what is arbitrary action on the part of administrative officials, at a hearing on denial of due process, depends upon circumstances. Shactman v. Dulles, 225 F. 2d 938, 96 U. S. App. D.C. 287.

The circumstances surrounding the removal support the view we take.

CONCLUSION

The decision below should be reversed and a mandate issued to the District Court, directing entry of an order, restoring appellant to her position from which she was unlawfully removed, with all rights and privileges that she is entitled.

Respectfully submitted,

Donald H. Dalton
Attorney for Appellant

Filed April 18, 1963

PLAINTIFF'S STATEMENT OF MATERIAL
FACTS AS TO WHICH THERE IS NO
GENUINE ISSUE PURSUANT TO RULE 9(h).

Plaintiff contends there is no genuine issue of material fact to the following:

1. Plaintiff, a Food Service Worker, WA-7408 - 2/1, \$1.26 per hour day, \$1.39 per hour night, commenced to work in the Veterans Administration Hospital, East Orange, New Jersey, on October 7, 1957, until an illegal removal on July 31, 1961, when she had attained competitive Civil Service status.
2. On or about June 20, 1961, she was requested to undergo a physical examination by the Chief Dietician of the Veterans Hospital, East Orange, New Jersey.
3. Plaintiff took a physical examination.
4. On July 31, 1961, she was removed from her position.
5. On August 2, 1961, her then attorney, Harvey G. Stevenson, wrote Veterans Administration requesting reasons for plaintiff's removal.
6. On August 3, 1961, George N. Rynick, Personnel Officer, Veterans Administration Hospital, East Orange, New Jersey, wrote the said Harvey G. Stevenson and enclosed a letter of proposed removal, dated June 26, 1961, and a letter of removal, dated July 6, 1961.
7. On August 5, 1961, the termination of her employment was administratively effective.
8. On September 4, 1961, her appeal to the Second U. S. Civil Service Region was denied.

9. On September 21, 1961, her appeal was denied by the Board of Appeals and Review.

10. On October 18, 1961, plaintiff filed Civil Action No. 870-61 in the U. S. District for the District of New Jersey, seeking judicial review of her removal. On April 26, 1961, this action was dismissed without prejudice.

11. On November 20, 1962, the present action was filed.

Donald H. Dalton
Attorney for plaintiff

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,016

LAURA ELLA GRIFFIN, APPELLANT

v.

JOHN S. GLEASON, JR., ET AL., APPELLEES

Appeal From The United States District
Court For The District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 9 1963

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,016

LAURA ELLA GRIFFIN, Appellant,

v.

JOHN S. GLEASON, JR., et al., Appellees.

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT

ARGUMENT

- I. THE APPELLEES ARE PLACING AN UNREASONABLE CONSTRUCTION ON THE LLOYD-LA FOLLETTE ACT, THE ADMINISTRATIVE PROCEDURE ACT AND CIVIL SERVICE REGULATIONS SO AS TO DENY APPELLANT DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT

The argument of appellees bring to mind the words of Hamlet:

"For Hecuba!
What's Hecuba to him, or he to Hecuba."

Appellees contend that the case raises only one issue and that is procedural due process, and that there is full compliance and the administrative record is unassailable. Appellees rely on their principal cases of Hofflund v. Seaton, 105 U.S. App. D.C.

171, 265 F.2d 363 (1961); Levine v. Farley, 70 U.S. App. D.C. 381, 107 F.2d 186 (1939); Minkoff v. Payne, 93 U.S. App. D.C. 123, 210 F.2d 689 (1953); Ping v. Kennedy, 111 U.S. App. D.C. 106, 294 F.2d 735 (1961); Wagner v. Higley, 98 U.S. App. D.C. 291, 235 F. 2d 518 (1956); United States v. Morgan, 313 U.S. 409 (1941); United States v. Carlos Bianchi and Co., 373 U.S. 709, (1963).

Appellant, clearly, raises the issue of denial of substantive due process. Appellees' cases are not in point. Appellant contends that the action was arbitrary, capricious and illegal.

Racial Discrimination and the Federal Law: Louis Lusky in A Problem in Nullification, 63 Columbia Law Review No. 7, 1163, 1165 (1963), illuminates and re-examines the Constitutional question raised.

"Its conception of the broad objectives of constitutional provisions such as the due process clauses, the equal protection clause, and the commerce clause has remained remarkably stable over the years. But the rules whereby those objectives are brought to bear upon particular fact situations are always subject to re-examination in the light of (a) changed social conditions,⁷

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E.g. the broadening of the reach of the commerce clause that began in 1937 when the Court - after some delay - took cognizance of the great and growing interdependence of our national economy and the resulting need for a larger degree of centralized regulation. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

(b) deeper insights into the existence and nature of the public interests that the constitutional provisions are designed to serve,⁸ and (c) better understanding of the operation, in actual practice, of rules previously announced.⁹

Appellant, an ignorant backwoods country woman, asks the Court to view her case in the light of actual facts as pertain to her and not "paint pictures in the mind" as to interpretation of administrative verbalism, which she did not comprehend. Appellant asks the Court to view the facts within the "broad objectives" of constitutional due process.

The construction placed by appellees on the Lloyd-La Follette Act, 5 U.S.C. 652 (a), Civil Service Regulation, 5 C.F.R. Section 9, 301, and 9.201, Section 10 (e) of the Administrative Procedure Act, 5 U.S.C., Section 1009 (e) is unreasonable. Justice Harlan of the Supreme Court in Plessy v. Ferguson, 163 U.S. 537, 558-559, stated:

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See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (recognizing the necessity and propriety of judicial intervention to preserve the corrective political processes); MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 470, 491, 512-17, 526, 527, 531, 534-35, 600 n. (1956); MASON, THE SUPREME COURT, PALLADIUM OF FREEDOM 151-52, 155-56, 160, 163, 165-67, 171, 173 (1962); Lusky, Minority Rights and the Public Interest, 52 YALE L.J. 1, 20-21, 26, 33-34 (1942).

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E.g., Brown v. Board of Educ., 347 U.S. 483 (1954), the 1954 school segregation decision, which did little more than recognize that "separate but equal" - initially plausible as an avenue to substantial equality - had proved itself, over a period of more than half a century, to be a contradiction in terms.

"The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not therefore stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all circumstances into consideration? A statute may be unreasonable merely because sound public policy forbade its enactment.... A statute may be valid and yet upon grounds of public policy may well be characterized as unreasonable.... Statutes must always have a reasonable construction....

"The white race deems itself to be the dominant race in this country, and so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not that it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty."

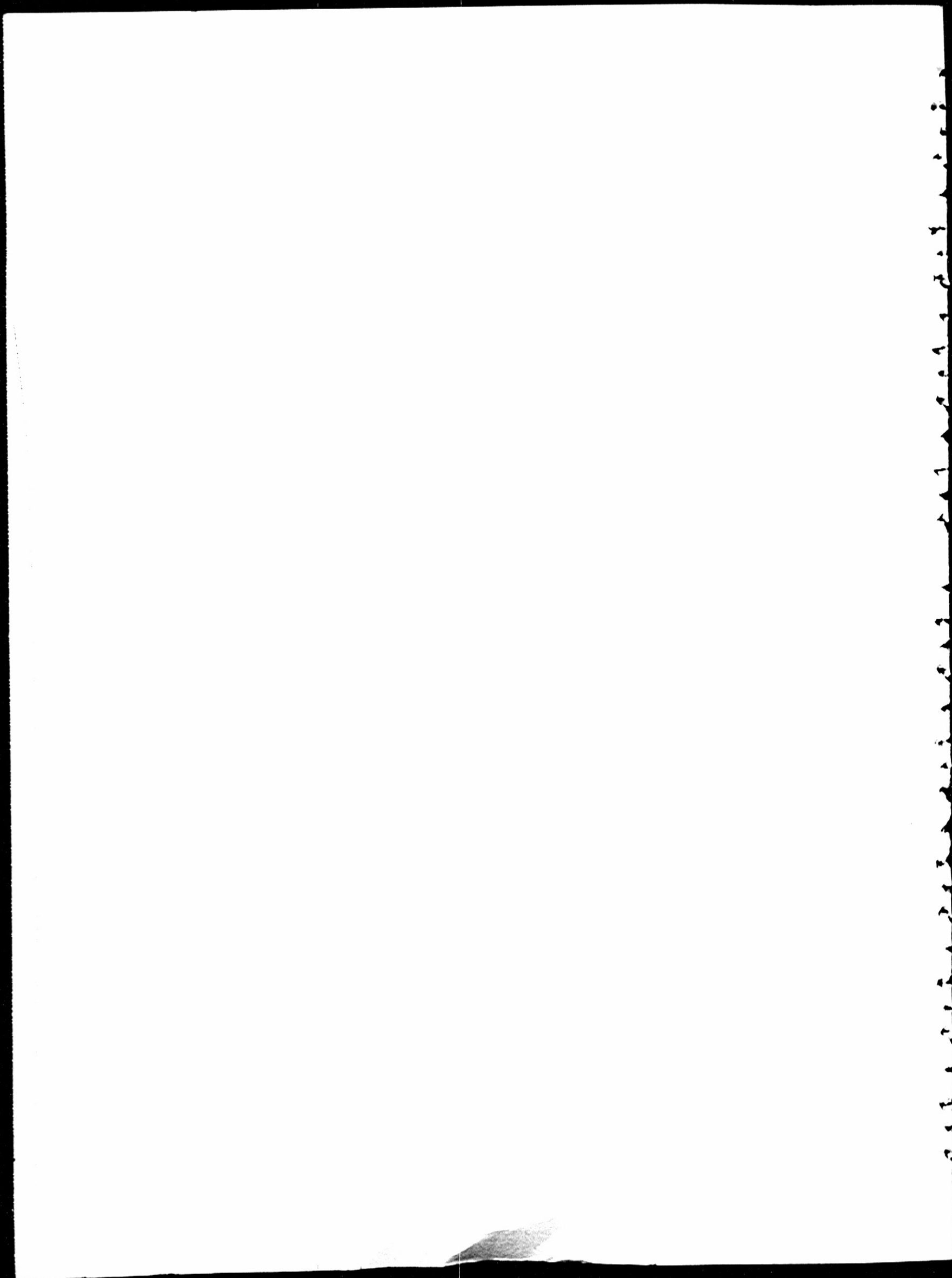
The Civil Service Commission favors retaining employees with mental problems. In February, 1963, a pamphlet, "Employment of the Mentally Restored in Federal Service" was issued, which stated in part:

"When President Kennedy struck the word 'physically' from the official name of the President's Committee on Employment of the Physically handicapped, he said:

"We want to emphasize the great importance of hiring people who may have suffered some degree of difficulty mentally. These people deserve our wholehearted support and cooperation in making it possible for them to live useful and fruitful lives."

II. APPELLANT RAISED GENUINE ISSUES OF MATERIAL FACT UNDER DISTRICT COURT RULE 9 (h).

Appellees, in good faith, contend that appellant did not oppose their Statement of Material Facts as to Which There Was No Genuine Issue Pursuant to Rule 9 (h); however, on the other hand, they in turn failed to oppose Appellant's Motion For Summary Judgment and failed to file a Statement of Genuine Issues!



Arguendo appellant's motion below should have been granted by default. Furthermore, this issue was not presented to the Court below by appellees, as it was raised for the first time in this Court.

Clearly, appellant, has raised in the Court below timely constitutional questions and has opposed appellees' Motion for Summary Judgment. It is submitted that substance and not form affirmatively protects legal rights.

CONCLUSION

Appellant should be restored to her position as food service worker.

Respectfully submitted,

Donald H. Dalton
Attorney for Appellant